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1369

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

VAN GESSNER,
Plaintiff in Error,
vs.
UNITED STATES OF AMERICA,
Defendant in Error.

1369

MARION R. BIGGS,
Plaintiff in Error,
vs.
UNITED STATES OF AMERICA,
Defendant in Error.

1370

JOHN NEWTON WILLIAMSON,
Plaintiff in Error,
vs.
UNITED STATES OF AMERICA,
Defendant in Error.

1368

BRIEF OF PLAINTIFFS IN ERROR ON APPEAL.

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Attorneys for the Defendant in Error

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Defendant in Error.

BRIEF OF PLAINTIFFS IN ERROR ON APPEAL.

The above cases were tried in the Court below upon an indictment charging the defendants jointly with the crime of conspiracy to suborn perjury. Separate judgments were entered

against each of the defendants and each of them has appealed separately to this court. As all were tried together upon the same indictment, the questions presented are identical and it is stipulated by plaintiffs and defendant in error that they may be heard together upon the same brief and argument.

Prior to the writ of error in this case the defendant Williamson, who was a representative in Congress, had sued out a writ of error to the Supreme Court of the United States, based upon the holding of that court in the Burton Case, that a sentence of imprisonment against a member of Congress involved a constitutional question, giving the right of appeal direct to that Court. At the time the writ of error was sued out in this case the constitutional question in the Burton Case had never been decided. This writ of error to this Court in the Williamson Case was sued out after the writ to the Supreme Court, and out of abundance of caution in case the writ to the United States Supreme Court should be dismissed upon jurisdictional grounds.

The jurisdiction of this Court, therefore, in the Williamson Case depends upon whether the United States Supreme Court shall entertain jurisdiction thereof and if it holds that it has jurisdiction to pass upon the merits, then the proceeding in this Court necessarily fails. If the Supreme Court should take jurisdiction in the Williamson Case and pass upon the merits, its decision will necessarily be controlling in all these cases, as the record and questions presented (except the constitutional one) are identical.

THE INDICTMENT INSUFFICIENT.

The indictment in the case attempts to charge the defendants with the crime of conspiracy to suborn perjury in the mat-

ter of applications for the purchase of timber lands under the Acts of Congress approved June 3rd, 1878, and August 4th, 1892, as found on pages 1545 and 1546, Vol. II, of the United States Compiled Statutes 1901. The indictment is very much involved and its allegations are exceedingly vague and uncertain as to the purpose of the alleged conspiracy and the character of the proceeding in which it was to be committed—so much so that the different judges before whom the case was tried (the jury twice disagreed) gave it entirely different constructions, Judge De Haven holding that it applied to the original application or filing only and Judge Hunt holding that it applied to the final proof.

It does not describe the lands which are claimed to have been the subject of the conspiracy, or state their amount or location (except that they are in Crook County, Oregon), neither does it in any way name or designate the persons who were to be suborned nor state they were unknown to the grand jury; the language in these regards being to "suborn, instigate and procure a large number of persons, to-wit, one hundred persons, to state and subscribe upon their oaths that *certain* public lands of the United States, lying in Crook County in said District of Oregon."

So the indictment did not allege that the conspiracy charged involved the intention on the part of the conspirators to do all the things necessary to be done to constitute subornation of perjury, and particularly in this: It is not alleged that the defendants as a part of the alleged conspiracy intended or contemplated that any one should swear to any matter which the conspiracy itself contemplated should be false.

It is not charged that the conspirators during the conspiracy

and as a part of it knew that they would in the future know that the matters to be sworn to by the persons to be suborned would be false. The contention on the part of the plaintiffs in error is that the two allegations contained in the indictment, concerning their knowledge of the falsity of the matter to be sworn to, attributes knowledge to them at some time in the future after the formation of the conspiracy, without any allegation that the defendants themselves as a part of the conspiracy, contemplated or knew that they would have any such future knowledge of the falsity of the matter to be sworn to.

Neither is it alleged in the indictment that the conspiracy involved the intention that the persons to be procured should willfully and corruptly take a false oath, or that the persons to be procured should knowingly and corruptly swear to that which was false.

There is nothing in this indictment which charges that the persons to be suborned were to subscribe the affidavits, etc., that they might swear to or that the same should be transmitted to the Register and Receiver of the local land office, when in order to be of any effect they must be so transmitted.

These questions were raised by demurrer and by motions in arrest of judgment and are presented in assignment of errors No. One, 135, 136.

INDICTMENT CHARGES PERJURY IN ORIGINAL APPLICATION. PROOF ADMITTED AS TO CONTENDED PERJURY IN FINAL PROOF.

It is the contention of the plaintiffs in error that if the indictment charges anything with such reasonable certainy as to inform the defendants of the charge against them, it is that the alleged perjury was committed in the matter of the *original*

application to purchase which is required by Section 2 of the above mentioned act. The statement which is alleged to have been falsely subscribed by them and which is the basis of the alleged perjury, being described as stating that the lands "were not being purchased by them on speculation, but were being purchased in good faith to be appropriated to the own exclusive use and benefit"*of those persons respectively*, and that they "had not directly or indirectly made any agreement or contract in any way or manner with any other person or persons whomsoever, by which the titles which they might acquire from the said United States in and to said lands should inure in whole or in part to the benefit of any person except himself" and this is the identical language of the original statement or application required by and Section 2. This was, as we understand it, the holding of Judge De Haven at the first trials, but at the last trial the prosecution was permitted to offer evidence of perjury in the final proof and the jury over the objection and protest of the defendants were permitted to base a conviction substantively thereon. This question was raised by objection to the evidence and by request for instruction which was refused and by exception to the instructions given and is covered by Assignments of Error Nos. 9, 10, 15, 22, 43, 101, 104, 131.

VARIANCE AS TO SCOPE OF AGREEMENT.

This not being a charge of actual subornation of perjury, but of an unexecuted conspiracy to suborn, it is contended by plainiffs in error that the unlawful plan or agreement becomes itself the substantive element of the charge and must be proved substantially as laid. The plan or conspiracy alleged was general in its character to suborn "a *large number of persons*, to-wit, *one hundred persons* to commit the offense of perjury,

etc." This was altogether a different thing from a plan to suborn one or two definite individuals—yet the prosecution was permitted to go to the jury on the theory that proof of a conspiracy to suborn one or two persons only, was sufficient to sustain a conviction.

This question was raised by a request to instruct the jury as follows:

The charge in the indictment is that there was an agreement between the defendants general in its character to suborn *a large number of persons* to commit perjury. An agreement to suborn one or two persons only would not sustain the indictment even if it were proven," and by an exception to its refusal. It is also raised by an exception to a part of the charge given by the Court which implied to the contrary. These questions are covered by Assignments No. 121 and No. 105.

ADMISSION OF EVIDENCE AS TO SECRET INTENTION OF APPLICANTS.

The prosecution made witnesses of the different applicants and was permitted to ask each of them what was "his intention" as to the disposal of the land at the time he filed—made final proof, etc. It was and is claimed by defendants, that, as this was a charge of prior conspiracy to suborn these applicants rather than actual perjury, the secret and undisclosed intentions of these applicants were not admissible or competent as against these defendants and this question was raised by suitable objections at the time of the admission of the evidence and is presented here by assignments of error No. 2, 3, 7, 8, 12, 13, 17, 19, 20, 21, etc.

EVIDENCE AS TO ALLEGED FALSITY IN APPLICATION OF DEFENDANTS BIGGS AND WILLIAMSON AS TO LAND TAKEN BY THEM BEING MOST VALUABLE FOR TIMBER.

After introducing in evidence the sworn statements of these defendants Biggs and Williamson stating that the land taken by them was most valuable for its timber, the prosecution were permitted over the objectoin of defendants to go at length into the character of the timber on these claims and offer evidence tending to show that the timber thereon was of comparatively little value and that it was more valuable for other purposes.

It was and is contended by the defendants that this testimony was inadmissible both because the defendants were charged with a conspiracy to suborn others, not to commit perjury themselves, and because there was no charge in the indictment of proposed falsity in the matter of the character of the lands—the indictment on the contrary alleging that the lands *were* subject to entry under the timber law. This question was raised by objection to the evidence. See assignments No. 32, 33, 35, 37, 39, and by request for instruction assignment No. 129.

EVIDENCE AS TO ALLEGED FALSITY IN THE APPLICATIONS OF THE VARIOUS PERSONS THAT THE INDICTMENT ALLEGES PLAINTIFFS IN ERROR WERE TO SUBORN, TOUCHING THE QUESTION OF WHETHER THE LAND APPLIED FOR WAS MORE VALUABLE FOR TIMBER OR OTHER PURPOSES.

Over the objection and exception of the plaintiffs in error the government was allowed to introduce evidence tending to

show that the timber was of comparative small value upon the land applied for by the various entrymen whom it was alleged plaintiffs in error conspired to suborn.

The evidence introduced on this question bore upon the truth of the statement contained in the various sworn statements and final proofs introduced in evidence. Evidence was introduced on this point tending to show that most if not all of the land described in the indictment wherein the alleged overt acts of Biggs are set out was of little value for timber and the plaintiffs in error contend that such testimony was inadmissible inasmuch as the indictment charged that the land was subject to entry under the timber and stone act, and that each of the persons mentioned in the valious alleged overt acts of Biggs was a person to be suborned. It is contended by plaintiffs in error that under the indictment the proceeding in which perjury was to be suborned were those wherein land chiefly valuable for its timber was being applied for. The question was raised by objections and exceptions to the testimony introduced tending to show that the land was of little value for timber, and by requests made the Court to charge the jury and is presented in assignments of error numbered 34, 35, 36, 37, 38, 39, 40, 41, 89, 94, 125,127 and 128.

THE ADMISSION OF EVIDENCE OF OTHER OFFENSES.

At the trial of the cause the Court permitted the prosecution to offer evidence tending to show that two of the defendants, Van Gesner and Williamson, had obtained land unlawfully from the State of Oregon and tending to show that defendant Van Gesner had induced one Mary W. Swearingen and his sis-

ter, Mrs. Gerowe, to purchase land from the State of Oregon for the benefit of said Williamson and Van Gesner and to commit perjury in the purchase of the land and also to offer evidence tending to show that said defendant Van Gesner had attempted to induce a Mr. Perry to make like purchase for their benefit.

These matters the prosecution were permitted to go into *in detail.*

The testimony was put in as rebuttal testimony and defend- Van Gesner was called for *re-cross-examination* in the matter after the defendants had rested their case and the prosecution had entered upon its rebuttal and for the ostensible purpose of laying a foundation for the impeachment of Van Gesner. Prior to this cross-examination said defendant had not testified at all in relation to the school land matters. The question was raised by objections to the testimony as incompetent and imaterial and tending to prejudice defendant by collateral matters and to the recall of the defendant for further cross-examination after close of defendant's case and also by objections to the questions as not proper cross-examination and also by objections to the testimony as to these transactions offered in rebuttal as not proper rebuttal and not proper impeaching questions and upon the ground that no sufficient foundation for the impeaching questions had been land. These questions are presented in assignments of error Nos. 53, 54, 66, 67, 68, 69, 70, 71, 72, 72a, 73, 74, 75, 76, 77, 78, 79, 80, 81, 95.

ERROR AS TO INSTRUCTIONS.

At the proper time the defendants asked the court to instruct the jury as follows: "Even if you should find that some one of the defendants intended to suborn perjury or even actual-

ly did so, this would not justify a conviction of the charge in this indictment unless you further find that two or more of these defendans, definitely planned and agreed among themselves to procure the alleged perjury." And again, "Even if you find that perjury was committed by some one or more of the applicants in question that would not justify a verdict of guilty unless you further find that at least two of the defendants conspired or agreed together to procure the perjury to be committed." And again, "The defendants are not charged with defrauding or attempting to defraud the government and therefore any mere attempt to evade the law on their part (if there was any such attempt) would not justify a verdict of guilty unless there was actually an agreement and conspiracy among themselves to procure perjury." But the Court refused to give each of the instructions and the questions presented thereby are presented by the exceptions to such refusal, and are covered by Assignments of Error Nos. 110, 111 and 112.

THE JURY SHOULD NOT HAVE BEEN PERMITTED TO BASE THEIR VERDICT UPON ANY FALSITY NOT CHARGED IN THE INDICTMENT.

This question was presented by the following instructions, which were requested by the defendants: "The charge in this indictment is that the oaths of the applicants in question were intended to be false in the matter of he alleged contract to convey to Van Gesner and Williamson and you must base your findings on that charge alone." And again, "*there is no charge in the indictment that the alleged oaths the applicants were to take were false as to he character of the land or, as to the manner of obtaining the money with which to pay for it.*" And again "*even if you should believe therefore that the applicant or some*

(The following was accidentally omitted from the statement of the case by the printer:)

IMPEACHMENT OF WITNESS BRANTON.

One Branton was an important witness for the defense. He testified that he was present at the time of the alleged arrangement between Van Gesner and a large number of the applicants and heard the talk and that Van Gesner did not agree to purchase the land, but on the contrary, refused to make any agreement; that Dr. Gesner was asged by one of the applicants if he would buy the claim and Dr. Gesner stated "that he could not buy them, he could not make a contract at all, and further said you can't sell them and went ahead to give his reasons for it." That "he said he had legal advice on the matter and he was told that he conld not make any contract at all." Etc. etc.

On cross-examination he was asked in relation to certain conversations at a place called the Adams Ranch, a few days before the talk between the applicants and Van Gesner referred to, and was asked where he was going at this time when he was at the Adams ranch, and he ansdered that he was going to Vale, which is in the Eastern part of the State of Oregon.

The prosecution was then permitted to ask him if he did not state to different parties at that time that he was going to *Idaho*, and to impeach him by calling witnesses to prove that he had stated at that time that he was going to the latter place.

The question was raised by proper objections to this evidence and the question is whether or not you may impeach and discredit a witness by proving alleged contradictory statements *in relation to a collateral matter in no way material to the case under consideration.*

There was also an attempt to impeach this witness by evidence tending to show that he had said to different persons that the reason why he didn't take a timber claim was because there was not enough in it. This declaration if made was probably proper matter of impeachment, but our contention in that regard is, that there was no sufficient foundation laid by asking the witness as to time, place and persons present.

of them were inaccurate or testified falsely as to where or how they obtained the money to prove up on their claims, that alone would not be sufficient to sustain a verdict of guilty in this cause." These instructions were refused and the questions are presented by exceptions to the separate refusal of each. They are covered by the 124th, 125th and 126th assignments of error.

INSTRUCTIONS AS TO OVERT ACT.

The Court charged the jury as follows: "The offense is sufficiently proved if the jury is satisfied from the evidence, beyond a reasonable doubt, that two or more of the parties charged, in any manner or through any contrivance positively or tacitly came to a mutual understanding to accomplish a common and unlawful design, followed by *some act* done by *any one of the parties* for the purpose of carrying ito int execution."

It was and is the contention of the defendants that this instruction should have been limited to the overt act charged in the indictment and also to the acts of defendant Biggs *who was the only person charged in the indictment to have committed any overt act.* The question is presented by proper exception to the instruction and is the 97th assignment of error.

THE FOLLOWING IS A SPECIFICATION OF THE ERRORS RELIED UPON BY THE PLAINTIFFS IN ERROR:

First. The said Circuit Court erred in overruling the demurrer of the said defendant Van Gesner to the indictment filed in said cause, demurring to said indictment upon the ground that it and the matters and facts therein contained, in the manner and form the same are stated, are not sufficient in law, and

are not sufficient to constitute a crime, and that said indictment is not direct and certain as to the crime charged, or the particular circumstances of the crime; and that it does not set forth the name or identity of the persons defendants, or charged with having conspired to suborn, and does not describe or identify the perjury which is alleged to have been suborned, instigated and procured, or the land as to which said perjury was committed.

SECOND. In overruling the objection of said defendant to the question asked witness Ben Jones.

Q. Now, at the time you signed and swore to it did you intend to convey this land to Dr. Gesner for the consideration named by him to, as testified by you, as soon as you obtained the title thereto?

And in permitting the witness to answer the same.

A. Yes, sir.

THIRD. In overruling the objection of the said defendant to the question asked of witness Ben Jones.

Q. Mr. Jones, at the time you subscribed this final proof paper, what was your intention with reference to this land as to what you would do with it when you obtained the title?

And in permitting the witness to answer the same.

A. Let Gesner have it.

FOURTH. In overruling the objection of the said defendant to the question asked of witness Green Beard.

Q. At the time you appeared before him to file did you sign these two papers (showing witness sworn statement or applications).

And in permitting the witness to answer the same.

A. They look very much like the papers I signed.

SEVENTH. In overruling the objection of the said defendant to the question asked of Green Beard.

Q. At the time you signed these papers what was your intention as to what you would do with the land when you obtained title to it?

And in permitting the witness to answer the same.

A. Why the land was to go—the land was to be turned over to Williamson and Gesner.

EIGHTH. In overruling the objection of the said defendant to the question asked of the witness John F. Watkins.

Q. What was your intention at the time you signed this, as to what you would do with the land, if anything, when you got it?

And in permitting the witness to answer the same.

A. I intended to convey it to that Company, Williamson & Gesner.

NINTH. In admitting over the objection of the said defendant the final proof papers of the witness John F. Watkins, as follows:

4-379

TIMBER AND STONE LANDS.

Testimony of Claimant.

John S. Watkins being called as a witness in support of his application to purchase the N. E. 1-4 of Sec. 24, Township 15 South, of Range 19, East W. M., testifies as follows:

Question 1. What is your age, postoffice address and where do you reside?

Answer. 43, Prineville, Ore., Crook Co., Ore.

Question 2. Are you a native born citizen of the United States, and if so, in what state or territory were you born?

Ans. Yes, in Oregon.

Ques. 3. Are you the identical person who applied to purchase this land on the 21st day of July, 1902, and made the sworn statement assigned by law before the Register (or Receiver) or United States Commissioner, on that day?

Ans. Yes.

Ques. 4. Are you acquainted with the land above described by personal inspection of each of its smallest legal subdivisions?

Ans. Yes.

Ques. 5. When and in what manner was such inspection made?

Ans. In July, 1902; personal inspection.

Ques. 6. Is the land occupied; or are there any improvements on it not made for ditch or canal purposes, or which were not made by or do not belong to you?

Ans. No.

Ques. 7. Is the land fit for cultivation, or would it be fit for cultivation if the timber were removed?

Ans. No.

Ques. 8. What is the situation of this land, and what is the nature of the soil, and what causes render the land unfit for cultivation?

Ans. Hilly, rough and rocky, and the soil is not fit for cultivation.

Ques. 9. Are there any salines, or indications of deposit of gold, silver, cinnibar, copper, or coal on this land? If so, state what they are, and whether the springs or mineral deposits are valuable?

Ans. No.

Ques. 10. Is the land more valuable for mineral or any other purposes than for the timber and stone thereon, or is it chiefly valuable for timber or stone?

Ans. Timber.

Ques. 11. From what facts do you conclude that the land is chiefly valuable for timber or stone?

Ans. It is rough, hilly and rocky and is covered with ordinary good timber.

Ques. 12. What is the estimated market value of the timber standing upon this land?

Ans. About $800.00.

Ques. 13. Have you sold or transferred your claim to this land since making your sworn statement, or have you directly or indirectly made any agreement or contract in any way or manner, with any person whomsoever, by which the title which you may acquire from the Government of the United States may inure in whole or in part, to the benefit of any person except yourself.

Ans. No.

Ques. 14. Do you make this entry in good faith for the appropriation of the land exclusively to your own use and not for the use or benefit of any other person?

Ans. Yes.

Ques. 15. Has any other person than yourself, or has any firm, corporation or association any interest in this entry you are now making, or in the land, or in the timber thereon?

Ans. No.

JOHN S. WATKINDS.

I hereby certify that the above named John S. Watkinds personally appeared before me; that I verily believe affiant to be the person he represents himself to be; and that each question and answer in the foregoing testimony was read to him in my presence before he signed his name thereto, and that the same

was subscribed and sworn to before me at Prineville, Oregon, this 8th day of December, 1902.

M. R. BIGGS,

U. S. Commissioner for District of Oregon.

NOTE: Every person swearing falsely to the above deposition is guilty of perjury and will be punished as provided by law for such offense. In addition thereto the money that may be paid for the lands is forfeited, and all conveyances of the land or of any right, title or claim thereto was absolutely null and void as against the United States.

I hereby certify that I have tested the accuracy of affiant's information and the bona fides of this entry by a close and sufficient oral cross-examination of the claimant, and his witnesses, directed to ascertain whether the entry is made in good faith for the appropriation of the land to the entryman's own use and not for sale or speculation, and whether he has conveyed the land or his right thereto, or agreed to make any such conveyance, or whether he has directly or indirectly entered into any contract or agreement in any manner with any person or persons whomsoever by which the title that may be acquired by the entry shall inure in whole or in part to the benefit of any person or persons except himself, and am satisfied from such examination that the entry is made in good faith for entryman's own exclusive use and not for sale or speculation, nor in the interest nor for the benefit of any other person or persons, firm or corporation.

M. R. BIGGS,

U. S. Commissioner for District of Oregon.

TENTH. In admitting over the objection of the said defendant the cross-examination of said claimant, J. F. Watkinds, made in connection with said final proof, as follows

TIMBER AND STONE LANDS.

Cross-Examination of Claimant in Connection with Direct Examination on Form 4-370.

Before taking the testimony the Register and Receiver will read or cause to be read to the witness, Section 2392 of the Revised Statutes in regard to perjury—see bottom of page on Form 4-371—and see that witness understands same.

Question 1. Are you an actual bona fide citizen of this state?

Answer. Yes.

Question 2. Are you married or single?

Answer. Married.

Question 3. Where did you reside prior to becoming a resident of this state, and what was your occupation?

Answer. Born and raised in Oregon. Am a farmer.

Question 4. How long have you been an actual resident of this state, and where have you lived during all of this time?

Answer. 43 years. Linn and Crook counties.

Question 5. What has been your occupation during the past year, and where and by whom have you been employed and at what compensation?

Answer. Farming for myself.

Question 6. How did you first learn about this particular tract of land and that it would be a good investment to buy it?

Answer. In July, wanting to take timber, went up in the timber and located this land.

Question 7. Did you pay or agree to pay anything for this information. If so, to whom and the amount?

Answer. No.

Question 8. Have you made a personal examination of

each smallest subdivision of said land? If so, state when and under what circumstances and with whom.

Answer. Yes, in July, with my wife and daughter, Wilford J. C. Cain and George M. Gaylord.

Question 9. How did you identify said lands? Describe it fully.

Answer. By Government corners as N. E. 1-4 Sec. 24, Tp. 15 S., R. 19 E. W. M.

Question 10. How many thousand feet, board measure, of lumber did you estimate that there is on this entire tract, and what is the stumpage value of same?

Answer. One and a half million feet, at 50 cents per M.

Question 11. Are you a practical lumberman or woodman? If not, how did you arrive at your estimate of the quantity and value of the lumber on the land?

Answer. I have worked a great deal in the woods.

Question 12. What do you expect to do with this land and lumber on it when you get title to it?

Answer. I expect to use it the best I can.

Question 13. Do you know of any capitalist or company which is offering to purchase timber land in the vicinity of this entry? If so, who are they and how did you know of them?

Answer. No.

Question 14. Has any person offered to purchase this land after you acquire title? If so, who and for what amount?

Answer. No.

Question 15. Where is the nearest and best market for the timber on this land at the present time?

Answer. Prineville, Or.

Question 16. Did you pay out of your individual funds,

all expenses in connection with making this filing and do you expect to pay for the land with your own money?

Answer. Yes.

Question 17. Where did you get the money with which to pay for this land, and how long have you had same in your actual possession?

Answer. Made it out of my hay crop of this year; had it about two months.

Question. Have you kept a bank account during the past six months, and if so, where?

Answer. No.

In addition to the foregoing the officer before whom the proof is made will ask such questions as seem necessary to bring out all the facts in the case.

JOHN S. WATKINDS.

TWELFTH. In overruling the objection of the said defendant to the question asked of said witness Joel Calavan.

Q. What was your understanding at the time as to what the terms were upon which you were taking it up?

And in permitting the witness to answer the same.

A. Why, I understood that I was to receive $500 for the same when the patent issued.

THIRTEENTH. In overruling the objection of the said defendant to the question asked of said witness Calavan.

Q. And it was your intention at the time you were making that filing to convey it for the $500 as soon as you did get patent, or what was your intention in respect to it?

And in permitting the witness to answer the same.

A. My inention was to convey it to them when I got patent.

FOURTEENTH. In overruling the objection of the said de-

fendant to the question asked of said witness Calavan.

Q. To whom?

And in permitting the witness to answer the same.

A. To Gesner.

FIFTEENTH. In admitting the final proof papers of the said witness Calavan, together with the cross-examination of the claimant which said final proof and cross-examination were substantially the same as in the case of witness Watkinds hereinbefore set forth.

SEVENTEENTH. In overruling the objection of the said defendant to each of the following questions, and in permitting the answers thereto.

Q. That was your idea at the time, was it?

A. Yes, sir.

Q. Now, at the time that you filed, what was your intention as to what you would do with the land when you got title?

A. It was my intention to let Gesner have it.

Q. What was your understanding as to whether you had promised to do that or not.

Q. Well, what did you believe.

A. Well, I would have felt that way if I had went ahead and proved up on land and they had furnished me the money to do it with.

Q. That was your understanding of it?

A. Yes, sir.

NINETEENTH. In overruling the objection of the said defendant to the question asked of witness Jeff Evans.

Q. Now, at the time you signed that paper, what was your intention as to what you would do with the land when you secured a patent to it?

And in permitting the answer to the same.

A. Well, of course, I calculated to sell it; I supposed that Mr. Gesner would take the land.

And also in overruling the same objection to each of the following questions and in permitting answers thereto by the same witness.

Q. For what consideration?

A. Well, I supposed he would give me $500.00 for it.

Q. Was it your intention at the time you signed that to carry that out?

A. Well, I intended to take that for it if I could not get anything more out of it.

Q. If you could not get anything more out of it?

A. Yes.

Q. Did you tell him that?

A. No, I didn't.

Q. You were careful not to, were you?

A. Yes.

Q. Why were you careful not to?

A. Well, I thought at the time maybe that I could get more out of it.

Q. Why didn't you let him know that.

A. Well, I don't know exactly. I thought it was a little sum of money to get out of it, but still if I could not get any more I calculated to take it.

Q. Why didn't you tell him you calculated to try to get more from some one else if you could?

A. I didn't think there was any use.

Q. Wasn't it because you didn't think he would lend you the money?

A. No, I didn't think—well, yes, I guess that is—that

would be the main thing. I supposed that he wanted the land. I knew that he wanted the land.

TWENTIETH. In overruling the objection of the said defendant to the question asked of witness Henry Hudson.

Q. What was your intention as to what you would do with the land at the time you signed that?

And in permitting the witness to answer the same.

A. Well, I was going to sell it, of course, if I could. I took it up for speculation.

And also in overruling the same objection to each of the following questions and permitting the answers thereto.

Q. Sell it to whom?

A. Well, I was going to sell it to the highest bidder. I was calculating to make $1000.00 out of it if I could, and if I could not I would let it go to Dr. Gesner.

Q. What did you understand at that particular time as to whether you had agreed to sell it to Gesner or not?

A. Well, I don't know, it was a kind of an agreement, a verbal one, though.

TWENTY-FIRST. In overruling the objection of the said defendant to the question asked of Christian Feuerhelm.

Q. Now, at the time you filed this paper—signed it—what was your intention as to what you were going to do with the land when you got title to it?

And in permitting the witness to answer the same.

A. Well, I thought it should go to Gesner.

TWENTY-SECOND. Error in admitting in evidence over the objection of the said defendant the final proof papers of the said witness Christian Feuerhelm, which said final proof papers were of like tenor and effect as those hereinbefore set forth of John Watkinds.

TWENTY-THIRD. In overruling the objection of the said defendant to the question asked of said witness Feuerhelm.

Q. What was your understanding when you left Gesner and when you filed on a claim as to whether you had promised that you would let him have it when you got the title.

And in permitting the witness to answer the same.

A. Well, there was no real promising.

And also in overruling the objection of each of the following questions and in permitting the answers thereto.

Q. You didn't say that.

A. No, sir.

Q. But what was your understanding as to what he believed and what did you believe.

A. I believed nothing else but I went in to file on the claim.

Q. At the time you filed, did you intend to let Dr. Gesner have the land when you got the title—at the time you were signing that paper—filing?

A. I guess I thought so.

TWENTY-FOURTH. In overruling the objection of the said defendant to the question asked of witness Lettie Watkinds.

Q. What did he say.

And in permitting the answer to the same.

A. Well, he said that Mr. Biggs wanted us to go and take timber clairs or something like that.

And also in overruling the objection of said defendant to each of the following questions and in permitting the answers to the same by the same witness.

Q. Do you remember what else he said about it as to what the terms were, or anything of that sort, what you were to make out of it?

A. Well, my understanding was we would make about $75.00.

Q. And how were you to make it?

A. Well, from Gesner and Williamson was my understanding.

Q. Is that what your husband told you.

A. I think so.

Q. Did he say what you were to do with the land when you got the title? Did your husband tell you what you were to do with the land when you got the title?

A. Yes sir.

Q. What did he say?

A. To sell it to Gesner & Williamson.

THIRTY-SECOND. In overruling the objection of the said defendant to the admission of each and all of the seven certain photographs taken by one A. B. McAlpin of different points on the timber claims of M. R. Biggs, one of the said defendants.

THIRTY-SECOND (*a*) Error in admitting over the objection of the said defendant each and all of the six photographs taken by said A. B. McAlpin on the claim of defendant Williamson so as to show different portions of said claim.

THIRTY-FOURTH. Error in admitting over the objection of the said defendant photographs of the claims of several of the other applicants, such applicants being other than the defendants.

THIRTY-FIFTH. In overruling the objection of the said defendant to the question asked of witness David Edgar.

Q. After looking at the memoranda, can you tell us as to the general character of the NE 1-4 of 24-15, 18 E-

And in permitting the witness to answer the same.

A. Yes, sir, I can give you a general idea. It is an open

country with very little timber to speak of. It is a grass country.

THIRTY-SIXTH. In overruling the objection of the said defendant to the question asked of witness David Edgar.

Q. What is the character of the whole of township 15-19, as to timber?

And in permitting the witness to answer the same.

A. What I saw of it, it does not amount to anything for the timber, I should think. That is, what I saw of it.

THIRTY-SEVENTH. In overruling the objection of the said defendant to the question asked of the witness David Edgar.

Q. What was the character of the Biggs claim?

And in permitting the witness to answer the same.

A. Well, it is open country, with some timber, a few trees, scrubby, nothing of any account.

THIRTY-EIGHTH. In overruling the objection of the said defendant to the question asked of said witness David Edgar.

Q. For lumber, what would you call the grade of the timber up there, the best of it?

And in permitting the witness to answer the same.

A. I would call it very poor, coarse.

THIRTY-NINTH. In overruling the objection of the said defendant to the question asked of said witness Edgar.

Q. Make an estimate of the amount of timber on the J. N. Williamson claim.

And in permitting the witness to answer the same.

A. I estimate the timber at 320,000 feet.

FORTIETH. In overruling the objection of the said defendant to the admission of similar questions and similar answers concerning the amount of timber upon different claims taken by different applicants, and to the answer of the wit-

ness tending to show the amount of timber of each of said different claims.

FORTY-FIRST. In overruling the objection of the said defendant to the testimony of one John C. Murray and one William Mitchell and each of them, each of whom testified along the same lines as the said witness Edgar.

FORTY-SECOND. In overruling the objection of the said defendant to the question asked of said witness William Mitchell.

Q. What did you hear him say?

And in permitting the witness to answer the same.

A. Dr. Gesner came into the hotel and Mr. Cooper said: "Hello, Doc, how is things getting along up there?" Those fellows fellows don't seem to be wanting to tell all they know; they dassant tell all they know.

FORTY-THIRD. In overruling the objection of the said defendant to the admission of the final proof of and cross-examination of Laura Biggs, and final proof and cross-examination of Mrs. Williamson, Ora F. Parker, Sarah Parker, ——— Foster, Mrs. Foster, Josiah Hinkle, Chas. Graves and Maria Graves, and in admitting the final proof and in admitting the cross-examination of each of said persons and of the whole.

FORTY-FOURTH. In overruling the motion of the said defendant for the striking out of all of the testimony in relation to the final proofs.

FIFTY-SECOND. In overruling the objection of the said defendant to the question asked of said witness Williamson.

Q. Didn't you have an interest in some with Boggs? In the neighborhood of the reserve, the lines of the reserve, which were withdrawn on July 28th, 1902. Didn't you have an interest in some school sections with Boggs and Gesner.

And in permitting and directing the witness to answer the same.

A. Not in that section of the country.

FIFTY-THIRD. In overruling the objection of the said fendant to the question asked of said witness Williamson.

Q. Did you have any in Crook county in connection with Boggs and Gesner?

And in permitting and directing the witness to answer the same.

A. I am not certain; there might have been a section or two. There might have been some. I have forgotten where that land is, but I think there was some next the line.

FIFTY-FOURTH. In overruling the objection of the said defendant to the question asked of said witness Williamson.

Q. Boggs secured the application for those in Prineville, for you in July 1902, didn't he?

And in permitting and directing the witness to answer the same.

A. No one ever secured any application for me.

SIXTY-FIRST. In overruling the objection of the said defendant to the question asked of witness Campbell Duncan.

Q. Mr. Duncan, when you first saw Clarence Branton—the witness hereinbefore referred to, there (at the Adams ranch) what did he tell you, if anything, as to where he was going?

And in permitting and directing the witness to answer the same.

A. He said he was going to Idaho, on his road there.

SIXTY-SECOND. In overruling the objection of the said defendant to the question asked of said witness Campbell Duncan.

Q. And in that talk did Branton tell you that the reason he did not take up a claim was because there wasn't enough in it?

And in permitting the witness to answer the same.

A. Yes, sir.

SIXTY-THIRD. In overruling the objection of the said defendant to the question asked of witness William Adams.

Q. Well, did he state to you that he was going to Idaho at that time?

And in permitting the witness to answer the same.

A. Yes, sir.

SIXTY-FOURTH. In overruling the objection of the defendant to the question asked of the said witness William Adams.

Q. I am talking about the time he was camped there. Did he then state to you that he was going to Idaho?

And in permitting the witness to answer the same.

Yes, sir.

SIXTY-FIFTH. In overruling the objection of the said defendant to the question asked of witness Frank Ray.

Q. And on that occasion, did he say to you that the reason he did not take a timber claim at that time that he was up there at the shearing plant was because there wasn't enough in it, or words to that effect.

And in permitting the witness to answer the same.

A. Yes, he did.

SIXTY-SIXTH. In overruling the objection of the said defendant to the question asked of witness Van Gesner.

Q. Doctor, I will ask you to examine that certified copy

of those letters, and you can examine the certificate also. The letter referred to was as follows

PRINEVILLE, Or., June 23, 1902.

M. L. Chamberlain,

Salem, Or.

My Dear Sir:

Inclosed find check for $80 for payment on the West half of Section 16, T. 15 S. R. 19 E., containing 320 acres. My sister, Mrs. S. M. Gerowe, will forward the application as soon as she can sign it. Who has the S. E. 1-4 of that section. Is it paid up on or it it subject to a new filing. Please let me know at your earliest convenience.

I remain

Yours respect.

VAN GESNER.

And in permitting the witness to answer the same.

A. I guess I wrote that letter.

SIXTY-SEVENTH. In overruling the objection of the defendant to the question asked of witness Van Gesner.

Q. You think you wrote that letter?

And in permitting the witness to answer the same.

A. Yes.

SIXTY-EIGHTH. In overruling the objection of the defendant to the question asked of witness Van Gesner.

Q. And received the reply that is attached there?

And in permitting the witness to answer the same.

A. I don't remember the reply! I don't remember anything about that.

SIXTY-NINTH. In overruling the objection of the said defendant to the question asked of witness Van Gesner.

Q. But you remember writing the letter?

And in permitting the witness to answer the same.

A. I remember writing some letter there.

SEVENTIETH. In overruling the objection of the defendant to admitting in evidence a certified copy of the application of Sarah M. Gerowe to purchase the W 1-2 of Section 15, Tp. 15, S. R. 19 E., dated 26th day of June, A. D. 1902, together with the affidavit attached.

SEVENTY-FIRST. In overruling the objection of the said defendant to the admission of a certified copy of a deed from the State Land Board to Williamson, Wakefield & Gesner for the same, bearing date of 21st day of August, 1902.

SEVENTY-SECOND. In overruling the objection of said defendant to the admission of a certified copy of the letter hereinbefore specified.

SEVENTY-SECOND...(*a*) In compelling the defendant Van Gesner to be recalled for further cross-examination after the close of defendant's case and after the opening of the Government's case in rebuttal, and in compelling him to answer the following questions.

SEVENTY-THIRD. In overruling the objection of the said defendant to the question asked of witness Van Gesner.

Q. Doctor, in Prineville, between the 15th day of June, 1902, and the 25th day of June, 1902, did you have a conversation with Lawrence T. Perry, in that conversation, did you ask him to sign a school land application and an assignment of the same to the firm of Williamson & Gesner, or Williamson, Wakefield & Gesner, and state to him that the land was up in Horse Heaven country; and did he ask you how much there would be in it for him, and did you answer $50; and did he then say, if he took up any school land, he would keep the land for his own use, and walked off, and did you say, as he was walking off, that

it would be no trouble, "All you would have to do would be to go to the office and sign a paper," or words to that effect?

And in permitting and directing the witness to answer the same?

A. I will say I never had any such conversation with Mr. Perry as that, none whatever at any time, June, July or any time.

SEVENTY-FOURTH. In overruling the objection of the defendant to the question asked of witness Van Gesner.

Q. On or about June 24, 1902, in Prineville, did you ask Mary W. Swearingen to file upon 320 acres of school land in section 16, township 15-19, in the Horse Heaven country and tell her that you would give her $50, if she would make the application and an assignment to Williamson & Gesner, or Williamson, Wakefield & Gesner, or words to that effect? Or did you tell her you would give her $25 for filing upon 160 acres, at the same time and place?

And in permitting and directing the witness to answer the same.

A. Why, I think she filed on a piece of land up there, but there was no contract to sell it to me. She was keeping boarders there, and there was a vacant piece, and I told her she could make something out of that land by filing on it, and if she wanted to file on it, I would let her have the money, and I did let her have the money, I think, and she filed on the land, and I bought the land of her. But I had no contract with her before to buy, no specified sum or anything else.

SEVENTY-FIFTH. In overruling the objection of the said defendant to the question asked of witness L. T. Perry.

Q. Mr. Perry, in Prineville, between the 15th and 26th of June, 1902, did Dr. Gesner ask you to sign a school land applica-

tion and an assignment to the firm of Williamson, Wakefield & Gesner, or Williamson & Gesner, and did you ask him where the land was, and did he tell you it was up in the Horse Heaven country; and then did you ask him what there would be in it for you, and did he answer $50? And did you then tell him if you took up any school land, you would keep the land for your own use, and did you start to walk off, and did he then say, it would be no trouble, "All you would have to do would be to go to the office and sign a paper."

And in permitting the witness to answer the same.

A. I had a conversation with Dr. Gesner, but I am lost as to the date; I would not say as to the date you speak of.

SEVENTY-SIXTH. In overruling the objection of the said defendant to the question asked of witness L. T. Perry.

Q. Now answer the question.

And in permitting the witness to answer the same.

A. The conversation that occurred between Dr. Gesner and myself occurred in front of Temple's drug store. He asked me this question, if I didn't want to take up a piece of school land—that conversation in substance and effect took place.

SEVENTY-SEVENTH. In overruling the objection of the said defendant to the question asked of witness Mary A. Swearingen.

Q. Will you state to the jury the circumstances under which you signed that paper, how you came to do it?

And in permitting the witness to answer the same.

A. Well, there isn't much to it. The Doctor just came down and asked me if I would file on a piece of school land; so I told him I would.

Juror. I can't understand you.

A. I say that he came and asked me if I would file on a piece of school land. I told him that I would. I went there and filed on the land. He was to give me $25 for filing on the 160 acres, as well as I remember; I don't remember just the amount. So I went before the county clerk, Mr. Smith, and filed on the school land.

SEVENTY-EIGHTH. In overruling the objection of the said defendant to the question asked of witness Mary Swearingen.

Q. Now, what did you say when he said that he wanted you to file on it, just what did he say. Tell the whole thing.

And in permitting the witness to answer the same.

A. Well, I don't remember just how it was.

SEVENTY-NINTH. In overruling the objection of the said defendant to the question asked of the witness Mary Swearingen.

Q. No; but the subsance of it as you can recollect it.

And in permitting the plaintiff to answer the same.

A. Well, just as well as I remember, he came down and he said that he would give my daughter and I $50 to file on a quarter section or a half section—something—I don't remember the amount; but, anyway, when the time came and we went to the clerk's office, part of it had been taken or he didn't want part of it—something like that, or they didn't say it was for him at all. Just asked us to file on it. And so my daughter didn't file, I filed on it and he gave me $25.

EIGHTIETH. In overruling the objection of the said defendant to the question asked of Mary Swearingen.

Q. Now, when you went up to file, what did you do when you got before the clerk; how did you come to go there?

And in permitting the witness to answer the same.

A. Well, I don't remember why or how I came to go there.

EIGHTY-FIRST. In overruling the objection of the said defendant to each of the following questions asked of the witness Mary Swearingen, and in permitting the witness to answer the same.

Q. When you went there did you have a description of the land?

A. No, sir.

Q. And when you got there did you tell the clerk what land you wanted?

A. The description was there.

Q. He had it, did he?

A. The clerk had it, yes, sir.

EIGHTY-SECOND. In overruling the objection of the said defendant to the admission of the application of the said Mary Swearingen in evidence.

EIGHTY-NINTH. In overruling the objection of the said defendant to the question asked of witness James Keenan.

Q. What sort of country is that for sheep pasture in 15-19?

And in permitting the witness to answer the same.

A. Well, I believe it is about the best I ever saw anywhere.

NINETIETH. In overruling the objection of the said defendant to the question asked of witness Gaylord.

Q. Was there a road running to it?

And in permitting the witness to answer the same.

A. Just a kind of a by-road where they had been using going in and out with their sheep supplies.

NINETY-FIRST. In overruling the objection of the said defendant to each of the following questions asked of witness Gaylord, and in permitting the witness to answer the same.

Q. Could you drive in there anywhere with a wagon without a road?

A. Yes, sir, most of the way.

NINETY-SECOND. In overruling the objection of the said defendant to the question asked of witness Thomas M. O'Connell.

Q. Now, then, how does the timber in 15-19 compare with the timber in 15-20, in a general way?

And in permitting the witness to answer the same.

A. Well, 15-20 is better timber.

NINETY-THIRD. In overruling the objection of the said defendant to each of the following questions asked of said witness O'Connell and in permitting the witness to answer each and all of the same.

Q. How does the timber in 15-19 compare with the timber in 14-19?

A. Well, what I done in 14-19 I think that is better.

Q. Did you locate anybody in 15-19?

A. No, sir.

Q. Did you attempt to?

A. No, sir.

Q. How does that 15-19 compare with the other townships that you mention that you have cruised there?

A. Well, I didn't do very much work in that town. I had been in across the town.

Q. What is the character of the timber in a general way as you found it in going across the town?

A. Well, it was short and very scattering, of a coarse nature.

NINETY-FOURTH. In overruling the objection of the said defendant to the question asked of witness James Keenan.

Q. What sort of a country is that for sheep pasture in 15-19?

And in permitting the witness to answer the same.

A. Well, I believe it is about the best I ever saw.

NINETY-FIFTH. In overruling the objection of the said defendant to the admission in evidence of a deed identified by G. G. Brown witness as a deed issued by the State Land Board to Mary A. Swearingen, of date June 24th, 1902, to the land applied for by her, which deed is as follows:

"STATE OF OREGON."

"In consideration of Two Hundred Dollars paid to the State Land Board, the State of Oregon does hereby grant, bargain, sell and convey unto Mary A. Swearingen, the following described land, to-wit: Situated in Crook County, Oregon; the Northeast Quarter of Section 16, Township 15 South, Range 19 East of the Willamette Meridian, containing 160 acres."

"To have and to hold the same unto said Mary A. Swearingen, her heirs and assigns forever."

"Witness the seal of the State Land Board, affixed this 26th day of June, 1902.

(Signed.) "T. T. GEER, Governor,
"I. F. DUNBAR, Secretary,
"CHARLES S. MOORE, Treasurer."

NINETY-SIX. In overruling the objection of the said defendant to the admission in evidence of a deed issued by the State Land Board of the State of Oregon to J. M. Williamson, E. N. Wakefield and V. Gesner, of which the following is a copy:

"STATE OF OREGON."

"In consideration of Four Hundred and 00-100 Dollars paid to the State Land Board, the State of Oregon does hereby grant, bargain, sell and convey unto J. M. Williamson, E. N. Wakefield and V. Gesner, the following described lands, to-wit: Situated in Crook County, Oregon; the West half of Section 16, Township 15 South, Range 19 East, of Willamette Meridian, containing 320 acres.

"To have and to hold the same unto said J. M. Williamson, E. N. Wakefield and V. Gesner, their heirs and assigns forever.

"Witness the seal of the State Land Board, affixed this 12th day of August, 1902.

(L. S.) "T. T. GEER, Governor,
"F. I. DUNBAR, Secretary,
"CHARLES S. MOORE, Treasurer."

NINETY-SEVENTH. The Court erred in instructing the jury in said cause as follows: "The offense is sufficiently proved if the jury is satisfied from the evidence, beyond a reasonable doubt, that two or more of the parties charged, in any manner or through any contrivance positively or tacitly came to a mutual understanding to accomplish a common and unlawful design, followed by some act done by any one of the parties for the purpose of carrying it into execution."

NINETY-EIGHTH. The Court erred in instructing the jury in said cause as follows: "Every person who procures another to commit any perjury is guilty of subornation of perjury, and is punishable by fine or imprisonment."

NINETY-NINTH. The Court erred in instructing the jury in said cause as follows: "So much of section 3 as is material reads as follows: "That upon the filing of said statement, as

provided in the second section of this act, the register of the land office shall post a notice of such application, embracing a description of the land by legal subdivisions, in his office, for a period of sixty days, and shall furnish the applicant a copy of the same for publication at the expense of such applicant, in a newspaper published nearest the location of the premises, for a like period of time; and after the expiration of said sixty days, if no adverse claim shall have been filed, the person desiring to purchase shall furnish to the register of the land office satisfactory evidence, first, that said notice of the application prepared by the register as aforesaid was duly published in a newspaper as herein required; secondly, that the land is of the character contemplated in this act; unoccupied and without improvements other than those excepted, either mining or agricultural, and that it apparently contains no valuable deposits of gold, silver, cinnabar, copper or coal that upon payment to the proper officer of the purchase money of said land, together wtih the fees of the register and the receiver, as provided for in the case of mining claims in the twelfth section of the act approved May tenth, eighteen hundred and seventy-two, the applicant may be permitted to enter said tract, and on the transmission to the General Land Office of the papers and testimony in the case, a patent shall issue thereon."

Effect is to be given to the provisions of the law by regulations to be prescribed by the Commissioner of the General Land Office at Washington.

The first step, therefore, on the part of any person desiring to avail himself of the benefits of the law is the filing of a written statement which must be sworn to before the register or receiver, or which may be sworn to before a United States Com-

missioner, designating the particular tract which the applicant *desires to purchase* setting forth that the land is unfit for cultivation, and valuable chiefly for its timber or stone; that it is uninhabited; contains no mining or other improvements except for ditch purposes, nor, as deponent verily believes, any valuable deposits of gold, silver cinnibar, copper or coal; that deponent has made no other *application* under this act; that he does not *apply to purchase* the same on speculation, but in good faith to appropriate the land to his own exclusive use and benefit; and that he has not directly or indirectly made any agreement or contract in any way or manner with any person or persons whomsoever, by which the title which he might acquire from the Government of the United States should inure in whole or in part to the benefit of any person except himself. If a person taking the oath to such statement swears falsely in the premises the law subjects him to all the pains and penalties of perjury.

ONE HUNDREDTH. The Court erred in instructing the jury in said cause as follows:

Now, when the sworn statement is filed, the register posts a notice of the application, embracing a description of the land, in his office for a period of sixty days, and furnishes the applicant a copy of the same for publication in a newspaper published nearest the location of the premises, for a like period of time. And it is provided by law, and by regulation duly made by proper authority and having the force and effect of law, that, after the expiration of said sixty days, the person or claimant desiring to purchase shall furnish to the register of the land office satisfactory evidence, among other things, that notice of the application prepared by the register was duly published in a newspaper as required by the law; that the land is of the character contemplated in the act; that the applicant has not sold or

transferred his claim to the land since making his sworn statement, and has not, directly or indirectly, made any agreement or contract, in any way or manner, with any person whomsoever, by which the title he may acquire from the Government, may inure, in whole or in part, to the benefit of any person except himself; and that he makes his entry in good faith for the appropriation of the land exclusively for his own use and not for the use and benefit of any other person.

One Hundred and First. The Court erred in instructing the jury in said cause as follows: But, as heretofore said, if he is not in good faith and has directly or indirectly made any agreement or contract in any way or manner with any persons by which the title he may acquire from the United States shall inure in whole or in part to the benefit of any persons except himself, then he commits perjury, in making his sworn statement, and in making a deposition that he has not done those things; and any person who knowingly and wilfully procured and instigates the person to make such sworn statement or deposition is guilty of subornation of perjury.

Having now placed before you the timber and stone law and what it denounces, and what it permits, if a man honestly and in good faith seeks advice of a lawyer as to what he may lawfully do in the matter of loaning money to upplicants under it, and fully and honestly lays all the facts before his counsel, and in good faith and honestly follows such advice, relying upon it and believing it to be correct, and only intends that his acts shall be lawful, he could not be convicted of crime which involves willful and unlawful intent, even if such advice were an inaccurate construction of the law. But, on the other hand, no man can wilfully and knowingly violate the law and excuse him-

self from the consequences thereof by pleading that he followed the advice of counsel. And especially in using the words therein "And in making a deposition that he has not done those things."

One Hundred and Second. The Court erred in instructing the jury in said cause as follows: The essential questions then for your determination are, does the evidence show, beyond a reasonable doubt, that Williamson, Gesner and Biggs, or two of them, knowingly and intentionally, entered into an agreement or combination to induce or procure persons to apply to purchase and enter the lands as alleged, or some part of the lands charged in the indictment as lands subject to entry under the timber and stone act, after having first come to an agreement or understanding with such persons that they would convey the title which they might acquire to Williamson & Gesner, or either of them; and next, does the evidence satisfy you beyond a reasonable doubt, that these defendants, so combining and agreeing, intended that the persons or some of the persons, whom they might procure or induce to make such entries should willfully and deliberately, in making their sworn statements or applications to purchase such lands at the time of making the first paper called a sworn statement, or at the time of making their depositions or sworn statements when they made their final proofs before the United States Commissioner, applying to purchase such lands, commit perjury by swearing falsely that their applications were not made on speculation, but in good faith to appropriate the lands to the exclusive use and benefit of the applicant or applicants, and that the applicant or applicants had not, directly or indirectly, made any agreement or contract in any way or manner, by which the title to be acquired from the United States should inure in whole or in part to the benefit of any persons other than

himself or herself. And especially in using the words in said foregoing instruction, "or some of the persons," and also in using the words therein "or at the time of making their depositions or sworn statements when they made their final proofs before the United States Commissioner."

One Hundred and Sixth. The Court erred in refusing to give the following instruction to the jury at the request of the defendant:

In order to constitute perjury there must be a willful and corrupt making of a false statement, and however false or untrue a statement may be, there can be no perjury if the person making the statement believes it to be true at the time of making it.

One Hundred and Seventh. The Court erred in refusing to give the following instruction to the jury requested by said defendant:

The suborning of perjury necessarily includes every element of actual perjury and in order to constitute that crime it is necessary that one person shall purposely and intentionally procure or induce another to commit perjury, that is, to willfully and corruptly and intentionally swear to something, which the party taking the oath does not believe to be true.

One Hundred and Eighth. In refusing to give the following instruction to the jury requested by said defendant:

If the defendants believed that the persons who were to make the statements in question could do so truthfully and without stating a falsehood, they would not be guilty of the crime charged, however much they may have been mistaken as to the law or the facts.

One Hundred and Ninth. In refusing to give the following instruction to the jury requested by said defendant:

If the defendants believed that the arrangement with the applicants for the land in question was within the law and that such applicants could truthfully make the statements in question, then they are not guilty of the crime charged, even if they were mistaken and the arrangement between them and the applicants were really in violation of law.

One Hundred and Tenth. In refusing to give the following instruction to the jury requested by said defendant:

Even if you should find that some one of the defendants intended to suborn perjury, or even actually did so, that would not justify a conviction, of the charge in this indictment unless you further find that two or more of these defendants, definitely planned and agreed among themselves to procure the alleged perjury.

One Hundred and Eleventh. In refusing to give the following instruction to the jury requested by said defendant:

Even if you find that perjury was committed by some one or more of the applicants in question, that would not justify a verdict of guilty unless you further find that at least two of the defendants conspired and agreed together to procure the perjury to be committed.

One Hundred and Twelfth...In refusing to give the following instruction to the jury requested by said defendant:

The defendants are not charged with defrauding or attempting to defraud the government, and therefore any mere attempt to evade the law upon their part (if there was any such attempt) would not justify a verdict of guilty unless there was actually a conspiracy or agreement between them to procure perjury.

One Hundred and Thirteenth. In refusing to give the following instruction to the jury requested by said defendant:

If you have a reasonable doubt as to whether there was an agreement between the defendants to procure perjury to be committed, you should give them the benefit of the doubt.

One Hundred and Fourteenth. In refusing to give the following instruction to the jury requested by said defendant:

Letters and declarations of certain of the defendants have been admitted in evidence, but before you can consider them as against any other defendant you must be satisfied beyond a reasonable doubt by other evidence independent of such statements that three was a conspiracy between the defendant making the statement and such other defendant to commit the crime.

One Hundred and Fifteen. In refusing to give the following instruction to the jury requested by said defendant:

An applicant for timber land has a right to file on it with the intention of selling it at a profit after he has acquired title; and such filing would be for his own use and benefit, within the meaning of the law.

One Hundred and Sixteenth. In refusing to give the following instruction to the jury requested by said defendant:

So the mere intention to sell at a profit at some future time would not be "on speculation" within the meaning of the law.

One Hundred and Seventeenth. In refusing to give the following instruction to the jury requested by said defendant:

Even if the applicant expected to sell the land to some particular person whom he knew to be buying timber land in that locality, it would be no violation of the law unless there was an actual contract to make the sale.

One Hundred and Eighteenth. In refusing to give the following instruction to the jury requested by said defendant:

An applicant for timber land has a right to borrow money

to prove up on his land, and if necessary to mortgage the land to secure payment, and this would be no violation of the law.

One Hundred and Nineteenth. In refusing to give the following instruction to the jury requested by said defendant:

He may also loan money to applicants to enable them to prove up, with the intention of buying if possible, after title is secured, and if there is no actual contract, for the sale of the land, his action in so doing would be lawful.

One Hundred and Twenty-first. In refusing to give the following instruction to the jury requested by said defendant:

The charge in the indictment is that there was an agreement between the defendants, general in its character, to suborn *a large number of persons* to commit perjury. An agreement to suborn one or two persons only would not sustain the indictment even if it were proven.

One Hundred and Twenty-second. In refusing to give the following instruction to the jury requested by said defendant:

The fact that a Grand Jury has found an indictment in this case should not be permitted to influence you in the least. The Grand Jury may hear only one side of the case, and the defendants had no opportunity to appear before that body and cross-examine the witnesses, and as I have said, its decision should not affect your judgment.

One Hundred and Twenty-third. In refusing to give the following instruction to the jury requested by said defendant:

If you find from the evidence that Gesner expressly refused to make a contract and did not intend to many any contract or agreement with the applicants for the purchase of the lands; the mere fact that he expected or intended to purchase it

at some future time, and that the applicants or some of them intended to sell to him if they could not do better (if you find these to be the facts) would not make an agreement which would be in violation of the law.

One Hundred and Twenty-fourth. In refusing to give the following instruction to the jury requested by said defendant:

The charge in this indictment is that the oaths of the applicants in question were intended to be false in the matter of the alleged contract to convey to Gesner and Williamson and you must base your findings upon that charge alone.

One Hundred and Twenty-fifth. In refusing to give the following instruction to the jury requested by said defendant:

There is no charge in the indictment, that the alleged oath that the applicants were to take, were false as to the character of the land or as to the manner of obtaining the money with which to pay for it.

One Hundred and Twenty-sixth. In refusing to give the following instruction to the jury requested by said defendant:

Even if you should believe therefore that the applicant or some of them were inaccurate or testified falsely as to where or how they obtained the money to prove up on their claims, that alone would not be sufficient to sustain a verdict of guilty in this cause.

One Hundred and Twenty-seventh. In refusing to give the following instruction to the jury requested by said defendant:

So there is no charge in the indictment of any intended falsity in the oaths of the applicants as to the amount or quality of timber on the different claims, and even if you should believe

from the evidence that there was some inaccuracy or falsity in that regard, in the oaths or proofs of some of the applicants, that would not be sufficinet to sustain a conviction.

One Hundred and Twenty-eighth. In refusing to give the following instruction to the jury requested by said defendant:

Indeed, it is alleged in the indictment that the lands in questions were "subject to filing under the timber and stone act" and this necessarily implies that they were chiefly valuable for timber and stone and you must assume for the purpose of this case that this is true. The indictment being based upon this theory the government is now estopped from claiming otherwise.

One Hundred and Twenty-ninth. In refusing to give the following instruction to the jury requested by said defendant:

The defendants are not charged with perjury in the matter of their own applications or final proofs, and they are not on trial therefore as to such application and proofs. You cannot therefore find them either guilty or not guilty as to the matter of the statements made in the matter of their own claims.

One Hundred and Thirtieth. In refusing to give the following instruction to the jury requested by said defendant:

In such case the mere fact that one of the lawyers to whom he applied for advice, was included with him in this indictment would make no difference as to his rights in the matter.

One Hundred and Thirty-first. In refusing to give the following instruction to the jury requested by said defendant:

In this case the indictment charges conspiracy to suborn perjury in the matter of the sworn statement or application and not in the matter of the final proof.

One Hundred and Thirty-second. In refusing to give

the following instruction to the jury requested by the defendant:

Experience in the administration of justice makes it proper for courts to advise juries that the testimony of an accomplice should be received with great caution, and should be carefully scrutinized. This is because of the position which he takes, as confessing contamination with guilt, and admitting participation in the very crime which he endeavors by his testimony to fix upon the person on trial.

One Hundred and Sixty-third. In refusing to give the following instruction to the jury requested by the defendant:

There has been evidence admitted tending to show the purchase of certain school lands by some of the defendants. Whether or not there was anything irregular or illegal in such purchases, the defendants are not now on trial therefor, and you cannot find them either guilty or innocent thereon.

One Hundred and Thirty-fourth. That the Court erred in overruling the motion of said defendant for a new trial and in not allowing the same.

One Hundred and Thirty-fifth. That the Court erred in overruling and denying the said defendant's motion in arrest of judgment upon the ground that the indictment does not state a crime and that it does not sufficiently or at all allege that this defendant or any of the said defendants at the time of the alleged conspiracy or at all, knew that the matter to be sworn to by the persons alleged to be suborned, would be false, or that the defendants or either of them, then knew that the persons to be suborned or any of them, would know their statements to be false at the time they were made, or that the defendants knew or believed, that the persons to be suborned or any of them would

knowingly or wilfully or corruptly, take a false oath in reference to the matters alleged in the indictment or at all.

One Hundred and Thirty-sixth. That the Court erred in overruling said motion for arrest of judgment and in not allowing the same, upon the ground that said indictment is so uncertain that it does not state a crime.

One Hundred and Thirty-seventh. That the Court erred in entering judgment against said defendant on said indictment, because the same was not sufficiently certain and definite and did not charge a crime.

One Hundred and Thirty-eighth. That said Court erred in sentencing said defendant to pay a fine and to imprisonment without his first being adjudged guilty of the crime charged in the indictment or of any crime.

One Hundred and Thirty-ninth. That said Court erred in pronouncing sentence against said defendant.

THE COURT ERRED IN OVERRULING THE DEMURRER TO THE INDICTMENT AND IN OVERRULING AND DENYING MOTION IN ARREST OF JUDGMENT

Section 5440 of the Revised Statutes under which this proceeding is brought, provides that if two or more persons conspire either to commit any offense against the United States or to defraud the United States in any manner or for any purpose, and one or more of such parties do an act to effect the object of the conspiracy, all of the parties to such conspiracy shall be liable to a penalty, etc. The indictment in this case attempts to charge a conspiracy to commit an offense against the United States, namely, the offense of subornation of perjury, it being alleged that the perjury to be suborned was to take place before an United States Commissioner when a large number of persons should appear before him who would be applying to enter and purchase lands open to entry under the acts of Congress approved June 3rd, 1878, and August 4th, 1892, and known as timber and stone lands. It is also alleged that such applicants would take an oath to the effect that they were applying to enter and purchase such lands in good faith and for their own exclusive use and benefit, and that they had not directly or indirectly made any contract, in any way or manner, with any other person or persons. The falsity of the oath was to consist, according to the allegations of the indictment in this, that such persons had made a contract whereby the title to the land they might acquire would inure to the benefit of other persons, namely, the two plaintiffs in error, Williamson and Gesner.

An indictment under this section charging a conspiracy to commit an offense against the United States must charge a conspiracy to commit a statutory offense, as there are no common law offenses against the United States, and the conspiracy must

be sufficiently charged; and it cannot be aided by the averment of acts done by any one or more of the conspirators in furtherance of the object of the conspiracy.

The indictment must state all the material facts and circumstances embraced in the definition of the offense, and if any essential element of the crime is omitted, such omission can not be supplied by intendment or implication. The language of the Statute may be used in the general description of an offense, but it must be accompanied by such a statement of the facts and circumstances as will inform the accused of the specific offense, coming under the general description, of which he is charged.

Such particulars are matters of substance and not of form, and their omision is not aided or cured by verdict.

An indictment under Section 5431 of the Revised Statutes alleging in the words of the Statute that the defendant feloniously, and with intent to defraud, did pass, utter and publish a falsely made, forged, counterfeited and altered obligation of the United States, but not further alleging that the defendant knew it to be false, counterfeited and altered, is insufficient even after verdict.

When the criminality of a conspiracy consists in an unlawful agreement to compass a criminal purpose that purpose must be fully and clearly stated in the indictment.

In support of the above propositions, see

Britton vs. United States, 108 U. S. 199; 27 L., Ed 698.
Pettibone et al vs. United States, 148 U. S. 197; 37 L. Ed. 419.
United States vs. Hess, 124 U. S. 486; 31 L. Ed. 516.
United States vs. Carl, 105 U. S. 611 (26:1135).
United States vs. Cruikshank 92 U. S. 542; (23:588).
United States vs. Simmons, 96 U. S. 360 (24:819).

The first two of the cases above cited were prosecuted under Section 5440, and in all cases prosecuted under the laws of the United States the accused has the constitutional right to be informed of the nature and cause of the accusation against him, which is construed to mean that the indictment must set forth the offense with clearness and all necessary certainty to apprise the accused of the crime with which he stands charged; that every ingredient of which the offense is composed must be accurately stated, and that the acts and intent, going to make up the particular offense sought to be charged, must be set forth in the indictment with reasonable particularity as to time, place and circumstances.

To constitute a good indictment for subornation of perjury the false swearing must be set out with the same detail as on an indictment for perjury, and the indictment must charge that the defendants procured the witness to testify, knowing that the testimony would be false and knowing that the witness knew that the testimony he was about to give was false, and knowing that he would corruptly and wilfully give false testimony. In support of this proposition, see

U. S. vs. Dunnee, 3 Woods 39; 35 Fed. Cases 817.
U. S. vs. Wilcox, 4 Blatch, 393; 28 Fed. Cases 600.
U. S. vs. Evans, 19 Fed. Rep. 912.

It follows that an indictment charging defendants with a conspiracy so suborn perjury must state that the conspiracy charged in the indictment contemplated the doing of each and a'l

of the elements that go to make up the offense of subornation of perjury, and among other things it would be necessary, under the rules above stated, that the indictment should allege that the conspirators intended as a part of their conspiracy that the persons to be suborned should knowingly, wilfully and corruptly give false testimony. That the defendants as a part of the alleged conspiracy knew that they would in the future know that the matters to be sworn to by the persons to be suborned would be false, and that the unlawful agreement, constituting the conspiracy, contemplated that false matters should be sworn to and matters known to the conspirators to be false.

We quote all that portion of the indictment which is necessary for a full understanding of the point under discussion:

"That John Newton Williamson, Van Gesner and Marion R. Biggs, late of the City of Prineville, in the district aforesaid, on the thirtieth day of June, in the year of our Lord nineteen hundred and two, at Prineville aforesaid, in the said district, unlawfully did conspire, combine, confederate and agree together, and with divers other persons to the said grand jurors unknown, to commit an offense against the said United States, that is to say, to unlawfully, wilfully and corruptly suborn, instigate and procure a large number of persons, to-wit, one hundred persons, to commit the offense of perjury in the said district by taking their oaths there respectively before a competent officer and person in cases in which a law of the said United States authorized an oath to be administered, that they would declare and depose truly that certain declarations and depositions by them to be subscribed were true, and by thereupon, contrary to such oaths, stating and subscribing material matters contained in such declarations and depositions which they should not believe to be

true; that is to say, to suborn, instigate and procure the said persons respectively to come in person before him, the said Marion R. Biggs, who was then and there a United States Commissioner for the said District of Oregon, and, after being duly sworn by and before him, the said Marion R. Biggs, as such United States Commissioner, to state and subscribe under their oaths that certain public lands of the said United States, lying in Crook County, in said District of Oregon, open to entry and purchase under the acts of Congress approved June 3, 1878, and August 4, 1892, and known as timber and stone lands, which those persons would then be applying to enter and purchase in the manner provided by law, were not being purchased by them on speculation, but were being purchased in good faith to be appropriated to the own exclusive use and benefit of those persons respectively, and that they had not directly or indirectly made any agreement or contract in any way or manner, with any other person or persons whomsoever, by which the titles which they might acquire from the said United States in and to such lands should inure in whole or in part to the benefit of any person except themselves, when in truth and in fact, as each of the said persons would then well know, and as they, the said John Newton Williamson, Van Gesner and Marion R. Biggs, would then well know, such persons would be applying to purchase such lands on speculation, and not in good faith to appropriate such lands to their own exclusive use and benefit respectively, and would have made agreements and contracts with them, the said John Newton Williamson, Van Gesner and Marion R. Biggs, by which the titles which they might acquire from the said United States in such lands would inure to the benefit of the said John Newton Williamson and Van Gesner, as co-partners in the firm of Williamson & Gesner, then and before then engaged

in the business of sheep raising in said county; the matters so to be stated, subscribed and sworn by the said persons being material matters under the circumstances and matters which the said persons to be suborned, instigated and procured, and the said John Newton Williamson, Van Gesner and Marion R. Biggs, would not believe to be true; and the said Marion R. Biggs, United States Commissioner as aforesaid, when administering such oaths to those persons, being an officer and person authorized by law of the said United States to administer the same oaths, and the said oaths being oaths administered in cases where a law of the said United States would then authorize an oath to be administered."

Is it alleged in the foregoing indictment that the defendants, or any of them, knew that the matters and things concerning which it is alleged the false oaths were to be taken were untrue when the conspiracy was formed?

Is it alleged, in any manner, that such knowledge was a part of such conspiracy, and that the plan or agreement, constituting the conspiracy, contemplated that the defendants, or any of them, should have the knowledge that the matters to be sworn, by the persons to be suborned, would be false?

A careful reading of the indictment will compel a negative answer to each of the foregoing questions.

There are two references in the indictment concerning the knowledge of the defendants as to the falsity of the matters to be sworn to by the persons who were to be suborned. In the first reference, it is alleged: "When in truth and in fact as each of the said persons would then well know and as they, the said John Newton Williamson, Van Gesner and Marion R. Biggs

would then well know such persons would be applying to purchase such lands on speculation."

The time when the defendants would have such knowledge is plainly alleged to be the same time as when the persons to be suborned would be applying to enter and purchase in the manner provided by law, and consequently at a time after the formation of the conspiracy and at or after the first overt act alleged in the indictment.

It is also perfectly obvious that it is not alleged that this knowledge was contemplated by the conspiracy or formed a part of it.

The allegation of their knowledge is interjected into the indictment not as showing what the conspiracy was or what it contemplated, but to show the state of mind of the defendants at some indefinite time in the future.

On the following page of the indictment we find the second reference to the defendants' knowledge of the alleged falsity of the matter to be sworn to. This reference is as follows: "And matters which the said persons so to be suborned, instigated and procured, and the said John Newton Williamson, Van Gesner and Marion R. Biggs would not believe to be true."

According to this allegation the defendants would have a knowledge of the falsity of statements to be sworn to at some indefinite future time, at what future time no person can say from the indictment; only this can be said with certainty that at some indefinite future time the defendants and the persons to be suborned would have knowledge that the matters to be sworn to were false.

The indictment does not allege that there was in the plan forming the conspiracy an agreement that the matter to be sworn to would be false.

Here again there is interjected into the indictment a statement concerning the future knowledge of the defendants.

All that has been said regarding the knowledge of the defendants touching the falsity of the matter to be sworn can be applied to the persons to be suborned.

On the first page of the indictment there is an allegation referring only to the persons to be suborned as follows: "Which they should not believe to be true." If the word "ought" had been used instead of the word "should" no different meaning would have been conveyed to the ordinary mind. As an allegation of knowldge it is worthless.

If an agreement of the kind referred to in the indictment were actually made between the defendants, the ultimate object of it was the acquiring of title to some portion of the public domain. The method of so acquiring title would be mere incidents in the plan, and it would be extremely improbable that the minds of the defendants should meet with definiteness enough, concerning these incidents, so that they would contemplate as a part of their agreement that all of the elements of perujry should enter into applications of the various persons who were to apply to enter the land desired. The pleader in this case undoubtedly was unconsciously influenced in his allegations by a realization that subornation of perjury was not the ultimate object of the agreement, and in stating what he assumed to be the agreement between the defendants he naturally omitted to set forth each element of the offense of subornation of perjury.

In this connection we cite the case of United States vs. Peuschel and Maid, 116 Fed. Rep. page 642.

In this case the defendants were charged by the indictment with a criminal conspiracy to defraud the United States by obtaining title and possession through homestead entry to mineral

lands not subject to entry. It was held that the fact that the land contained valuable minerals and knowledge of such fact by the conspirators at the time the conspiracy was formed are essential and must be averred in the indictment.

It was alleged that said Edward A. Peuschel and Frederick G. Maid then and there well knew that there were then and there within the limits of said land valuable mineral deposits; the Court held that from the words of reference used it was impossible to determine whether the defendants had the knowledge imputed to them at the time the conspiracy was formed or at the time of the filing of an affidavit thereafter made, or at the time of the filing of a homestead application; and this was fatal to the indictment. The indictment in the Pauschel and Maid case was infinitely better than the one under discussion as to the indictment could be construed to as to impute knowledge to the defendants at the time of the formaion of the conspiracy.

The indictment is utterly void of any allegation to the effect that the defendants intended that any one should wilfully take a false oath.

THE INDICTMENT IS VAGUE AS TO THE CHARACTER OF THE PROCEEDINGS IN WHICH AND THE TIME WHEN THE ALLEGD SUBORNATION OF PERJURY WAS TO TAKE PLACE, AND AS TO WHETHER THE INDICTMENT CHARGES THAT THE PROCEEDINGS IN WHICH THE ALLEGED SUBORNATION OF PERJURY WAS TO TAKE PLACE INCLUDED THE PROCEEDINGS AT THE TIME OF FINAL PROOF.

There is no doubt but that as a matter of law the proceedings should be pointed out in the indictment so that (among

other reasons) the defendants may prepare for their trial, and that the offense may be identified.

Our contention upon this point is mentioned in discussing the question of error in admitting evidence concerning final proof, and in giving and refusing instructions and in allowing the jury to base a verdict upon the theory that the indictment alleged a conspiracy to suborn perjury at the time of final proof. We argue the question there at some length and indicate our opinion as to what the indictment does charge.

In favor of the proposition that the indictment is fatally defective on account of its uncertainty in describing and characterizing the proceedings in which perjury is to be suborned, we cite the opinion of the two judges who tried this case. First, Judge DeHaven held that the proceedings at the time of final proof were not included in the proceedings wherein perjury was to be suborned.

Second, Judge Hunt held that the proceedings at the time of final proof were included and he allowed the jury to base a verdict on a conspiracy to suborn perjury at the time of and in the making of final proof.

Judge DeHaven overruled the demurrer challenging the indictment on the ground of uncertainty, among other things, and in this ruling Judge Hunt apparently concurred.

The two judges apparently agree in holding that the indictment was certain and definite, but they radically disagreed with each other as to what it meant.

In further support of the contention now being made we cite

Miller vs. United States, 133 Fed. Rep. 341.

Miller and others were tried under Section 5440 under an indictment charging a conspiracy to commit an offense against the United States.

The Court in undertaking to state how clear an indictment should be, uses the following language:

"When one is indicted for a serious offense, the presumption is that he is not guilty, and that he is ignorant of the supposed facts upon which the charge against him is founded. He is unable to secure and present the evidence in his defense—indeed, he is deprived of all reasonable opportunity to defend—unless the indictment clearly discloses the facts upon which the charge of the commission of the offense is based. It must set forth the facts which the pleader claims constitute the alleged transgression so distinctly as to advise the accused of the charge which he has to meet, so fully as to give him a fair opportunity to prepare his defense, so particularly as to enable him to avail himself of a conviction or acquittal in defense of another prosecution for the same crime, and so clearly that the Court, upon an examination of the indictment, may be able to determine whether or not, under the law, the facts there stated are sufficient to support a conviction."

It has been said by an eminent judge in effect that an indictment should be so clear that a person of ordinary understanding upon his arraignment by hearing the indictment read at that time can determine its meaning and prepare for its defense.

Measured by the test laid down in the Miller case, supra, the indictment under consideration is most certainly bad, as judges learned in the law differ as to its construction.

By the aid of counsel it would have been impossible for defendants to have determined even after two trials what charge they had to meet on the third trial under the same indictment.

We submit that the demurrer to the indictments should have been sustained, and that the judge who tried the case last should not have sent the defendants to trial for a third time upon a radically different charge from what they had already been twice tried, all three trials being had under the same indictment.

FURTHER, THE INDICTMENT DOES NOT IDENTIFY THE PARTICULAR OFFENSE IN THIS: THAT IT DOES NOT MENTION THE NAMES OF THE PARTIES TO BE SUBORNED, OR STATE THAT SUCH NAMES WERE TO THE GRAND JURORS UNKNOWN, OR THAT THE CONSPIRACY CONTEMPLATED THE SUBORNATION OF PERSONS THEN UNKNOWN TO THE ALLEGED CONSPIRATORS; NOR DOES IT IDENTIFY THE LANDS WHICH WERE TO BE ENTERED.

While a reading of the overt acts alleged leads one to the conclusion that the names of some of the persons to be suborned were known yet the overt acts cannot be referred to for the purpose of aiding the indictment in this respect.

See cases cited supra.

If the conspiracy was to suborn persons to be determined upon thereafter or whatever persons defendants might be able to procure to commit perjury the indictment should have so stated. We concede that the indictment need not be more specific than the conspiracy in its details, but this does not prevent the application of the rule contended for.

It should all the time be borne in mind that the conspiracy attempted to be charged here is a conspiracy to commit a statutory offense, each and all of the elements of which could be pointed out.

This point is of importance to the defendants as well as the

one last argued. If the charge relates to the time of final proof as the proceedings in which perjury was to be committed, it is an entirely different conspiracy from one relating to the time when application is first made and supported by different evidence. It would have assisted in identifying the offense if the indictment had alleged the names of the persons to be suborned or stated that they were unknown to the grand jurors or unknown to the conspirators at the time the alleged conspiracy was entered into.

That it is necessary to name the persons to be suborned if known or state that they are unknown, etc., see Section 1396, 2nd Vol. of Wharton on Criminal Law, 9th Ed.

For a concise statement of the law as to what constitutes uncertainty in an indictment under Section 5440.

See U. S. vs. Walsh, 28 Fed. Cases, page 394, case No 16636.

More laxity is allowed in cases charging a conspiracy to defraud than in a conspiracy to commit an offense against the United States.

IT IS FURTHER CONTENDED THAT THE INDICTMENT DOES NOT STATE AN OFFENSE IN THIS: THAT IT DOES NOT ALLEGE THAT THE STATEMENTS TO BE SUBSCRIBED AND SWORN TO BY THE PERSONS TO BE SUBORNED WERE TO BE TRANSMITTED TO THE REGISTER AND RECEIVER OF THE LOCAL LAND OFFICE, AND THAT THE CONSPIRACY SO CONTEMPLATED.

The Statute (see page 209 Supplement 1903, Compiled Statutes of United States, 1901) authorizing the administration by a U. S. Commissioner of oaths in application under the timber and stone act, provides that the proof, affidavit and oath when so

made and duly subscribed, shall have the same force and effect as if made before the Register and Receiver when transmitted to them with the fees and commissions allowed and required by law.

Thre is nothing in this indictment which charges that the witnesses were to subscribe affidavits, etc., that they might swear to or that the same should be transmitted to the Register and Receiver.

In order to be of any effect and be material, they must be so transmitted.

See State of Washington vs. Ed. Smith. 3 Wash., p. 14, and cases therein cited.

In the Smith case, supra, it is stated that under Section 867 Code 1881, an information does not sufficiently charge the crime of perjury for the making of a false affidavit when it does not allege that such affidavit is sworn to for the purpose of being used in some action or proceeding wherein by law such affidavit would be material, or by using or consenting to the use of such affidavit after being sworn to in such action or proceeding.

Section 867 referred in the decision reads as follows:

Sec. 867. Every person who, having taken an oath that he will testify, declare, depose or certify truly before any competent tribunal, officer or person, in any of the cases in which such an oath may by lew be administered, wilfully and contrary to such oath, states as true any material matter which he knows to be false, is guilty of perjury.

The indictment referred to is printed on page — of the record; the demurrer page —, the motion in arrest of judgment page — motion for new trial on page —, and assignment of errors No. 1 on page —, 135 on page —, 136 on page — and 134 on page —.

We submit that the demurrer to the indictment ought to have been sustained; that the motion in arrest of judgment and for a new trial ought to have been granted.

THE COURT ERRED IN HOLDING THAT THE CONSPIRACY ALLEGED IN THE INDICTMENT CONTEMPLATED THAT PERSONS WERE TO BE SUBORNED AT THE TIME OF FINAL PROOF AND IN ADMITTING EVIDENCE TENDING TO PROVE SUCH CONSPIRACY: THE COURT ERRED IN ADMITTING EVIDENCE TENDING TO SHOW PERJURY IN FINAL PROOF; THE COURT ERRED IN INSTRUCTING THE JURY THAT IT MIGHT BASE A CONVICTION ON A CONSPIRACY TO SUBORN PERJURY AT THE TIME OF FINAL PROOF.

It was error to consider the final proofs as it is not charged that the conspiracy involved subornation of perjury at that time, and (2) according to the allegations of the indictment the false statements on the part of the persons to be suborned was to consist in their swearing falsely that the land which they were applying to enter was not being purchased by them on speculation, but were being purchased in good faith to be appropriated to the exclusive use and benefit of such applicants, and that they had not directly or indirectly made any agreement or contract in any way or manner with any other person or persons whomsoever by which the title which they might acquire from the United States in and to such lands should inure in whole or in part to the benefit of any person except themselves.

Under the law such oath was required at the time of the making of the written statement or application as it is called in the statute, but it was not required at the time of final proof by any statute of the United States. The two sections of the statute referred to being as follows (Pages 1545-1546, Volume 2, United States Compiled Statutes, 1901):

"Applications for purchase of timber and stone lands; false swearing; penalty.

"Sec. 2. That any person desiring to avail himself of the provisions of this act shall file with the register of the proper district a written statement in duplicate, one of which is to be transmitted to the General Land Office, designating by legal subdivisions the particular tract of land he desired to purchase, setting forth that the same is unfit for cultivation, and valuable chiefly for its timber or stone; that it is uninhabited; contains no mining or other improvements, except for ditch or canal purposes, where any such do exist, save such as were made by or belong to the applicant, nor, as deponent verily believes, any valuable deposit of gold, silver, cinnibar, copper or coal; that deponent has made no other application under this act; that he does not apply to purchase the same under speculation, but in good faith to appropriate it to his own exclusive use and benefit; and that he has not, directly or indirectly, made any agreement or contract, in any way or manner, with any person or persons whatsoever, by which the title which he might acquire from the government of the United States should inure in whole or in part, to the benefit of any person except himself; which statement must be verified by oath of the applicant before the register or the receiver of the land office within the district where the land is situated; and if any person taking such oath shall swear falsely in the premises, he shall be subject to all the pains and penalties of perjury and shall forfeit the money which he may have paid for such lands; and all right and title to the same; and in any grant or conveyance which he may have made, except in the hands of bona-fide purchasers, shall be null and void.

Act June 3, 1878, c. 151, 2, 20 Stat. 89.

Publication of application for purchase; proofs, entry and patent; regulations.

Sec. 3. That upon the filing of such statement, as provided in the second section of this act, the register of the land office, shall post a notice of such application, embracing a description of the land by legal subdivisions, in his office, for a period of sixty days, and shall furnish the applicant a copy of the same for publication, at the expense of such applicant, in a newspaper published nearest the location of the premises, for a like period of time; and after the expiration of said sixty days, if no adverse claim shall have been filed, the person desiring to purchase shall furnish to the register of the land office satisfactory evidence, first, that said notice of the application prepared by the register as aforesaid was duly published in a newspaper as herein required; secondly, that the land is of the character contemplated in this act, unoccupied and without improvements, other than those excepted, either mining or agricultural, and that it apparently contains no valuable deposits of gold, silver, cinnabar, copper or coal; and upon the payment to the proper officer of the purchase money of said land, together with the fees of the register and the receiver, as provided for in case of mining claims in the twelfth section of the act approved May tenth, eighteen hundred and seventy-two, the applicant may be permitted to enter said tract, and, on the transmission to the General Land Office of the papers and testimony in the case, a patent shall issue thereon; Provided, That any person having a valid claim to any portion of the land may object, in writing, to the issuance of a patent to lands so held by him, stating the nature of his claim thereto; and evidence shall be taken, and the merits of said objection shall be determined by the officers of the land office, subject to appeal, as in other land cases. Ef-

fect shall be given to the foregoing provisions of this act by regulations to be prescribed by the Commisisoner of the Genera' Land Office."

"Act June 3, 1878, c. 151, 3, 20 Stat. 90.

"Act May 10, 1872, c. 152, 12, mentioned in this section, is incorporated into Rev. St. 2334."

The first question for discussion is this: Does the conspiracy mentioned in the indictment involve the intention that perjury should be committed at any other time or in any other proceeding than at the time when the written statement should be made, which is the initial proceeding taken by an applicant to acquire land under the timber and stone act.

We contend that the subornation of perjury refered to in the indictment was to take place at the time of the making of said written statement.

We have heretofore cited the unpublished decision of Judge DeHaven in this matter assuming that it is entitled to as much weight as it would be if published.

We are not contending that the indictment is free from ambiguity or uncertainty, or sufficiently clear so that a demurrer to it should be overruled.

Indeed we could not well make such a contention in view of the variety of decision upon this indictment arrived at by men of much more than ordinary understanding. However, we contend if the indictment is held to allege anything with certainty it alleges that the conspiracy charged did not contemplate the subornation of perjury at the time of final proof.

We are led to this conclusion because the written statement which is made by the applicant, as his initiatory step in making his application, includes the very matters and things concerning

which it is alleged in the indictment perjury was to be suborned.

See Section 2 of the Act above quoted.

Further it is not charged in the indictment that there was to be any false statement made about any matter or thing which the statute provides shall be proved at the time of final proof.

The pleader copied from the statute the matter that must be included in the written statement and alleged that the conspiracy contemplated that a large number of persons should swear falsely with reference to these matters and things. Again, it is alleged that at the time when perjury was to be suborned the persons to be suborned would then be applying to enter and purchase in the manner provided by law, and a person who makes the written statement referred to in the second section of said act is by the statute denominated an applicant and his written statement made at the time of such application is denominated an application.

Upon reading the statute of the United States relative to this matter and the indictment it appears that no reference was made in the indictment to the proceedings necessary to be had under the statute at the time of final proof, it is not alleged in the indictment that the conspiracy contemplated that any person should swear falsely about any matter required by statute to be proved at the time of final proof.

A most careful scruting of the indictment will not reveal that it was in contemplation of the conspiracy alleged that any one of the persons to be suborned should ever make final proof or ever take any oath of any kind at that time.

A large number of overt acts are alleged to have been done by the defendant Biggs, and each of them consisted in making a written statement for the signature of the several applicants. The statute provides as above set forth for the making of a

written statement when application is made, which statement contains all the matters which were to be falsely sworn to under the allegations of the indictment. The statute does not provide that the applicant shall make oath at any other time to the matters contained in the written statement concerning which it is alleged perjury was to be suborned. On the other hand the statute provides just what shall be sworn to by the applicant at the time of final proof, which final proof must be made at least sixty days after the making of the written staement.. It is an entirely different proceeding, at an entirely different time, a proceeding at which other facts than those mentioned in the written statement are to be proved, and a proceeding in which none of the matters concerning whicht it is alleged, perjury was to be suborned are to be proved. We submit that it is clear as any thing that can be gathered from this indictment that the indictment does not charge that the alleged conspiracy intended to syborn perjury at the time of final proof.

It may at least be contended with propriety that an indictment means what it was construed to mean at two trials under it, and that if this indictment can be construed to refer to the time of final proof it is so vague in that respect that a large number of persons were decived as to the true meaning.

It is to be observed that there is a different penalty attached to false swearing under Section 2 from the prescribed penalty under Section 3, that under Section 2 in addition to the offending party being subject to all the pains and penalties of perjury he shall forfeit the money which he may have paid for the land and all right and title to the same, etc. No such penalty is provided in the 3rd section as against a person taking a false oath at the time of final proof.

We make the further contention that the Court erred in ad-

mitting testimony concerning the final proof, and in instructing the jury in such a manner that a verdict of guilty might be returned if the jury believed that a conspiracy was entered into to procure persons to swear falsely at the time of final proof, and the court erred in these particulars, even though this Court should be of the opinion that .the indictment undertakes to charge that persons were to be suborned at the time of final proof, for the reason that there is no law of the United States authorizing an oath to be administered to a person, at the time of final proof, concerning the matters and things, that the persons to be suborned are alleged to have sworn falsely about, under the allegation of the indictment.

As noted above, the statute provides that "Effect shall be given to the foregoing provisions of this act by regulations to be prscribed by the Commissioner of the General Land Office," and it is contended on the part of the government that the Commissioner of the General Land Office has by appropriate regulations provided that evidence shall be taken at the time of final proof to establish the truth of the matters that must be verified by the applicant in his written statement, and that the rules and regulations so promulgated have all of the force and effect of law, even for criminal purposes. The plaintiffs in error resist this contention and earnestly insist that a statute of the United States cannot be added to for criminal purposes by a departmental regulation.

In the first place, the only authority that is contemplated to be conferred upon the Commissioner of the General Land Office is to enable him by regulations to give effect to the provisions of this act. It was intended that by such regulations, effect should be given to what Congress had already enacted and there is no

intention manifest in the statute to confer upon the Commissioner the power to add to the congressional enactment.

Indeed Congress itself cannot delegate to any person or tribunal the powers which are legislative, and if it should attempt to do so it would be unconstitutional exercise of power, inasmuch as the legislative power of the United States is vested exclusively in Congress by the Constitution. The power sought here to be exercised by the Commisisoner is plainly legislative, because he has undertaken to add to the statute itself, and has determined what it, the statute, shall be, and what it shall contain.

See *Cincinnati W. & C. R. C. vs. Clinton County Comrs.* 1st Ohio. State 88.

Cooley's Constitutional Limitations, P. 137, 6th Edition.

If the Commissioner of the General Land Office has the authority to add the matter in question to the third section of the statute under discussion, he could add whatever else might seem to him best.

That no part of the legislative power conferred upon congress by the constitution can be delegated to any other department of the government is universally recognized as the law, and the only question that is involved here is this: Has the Commissioner in the making of the regulation referred to exercised legislative powers? If he has, whether authorized so to do by Congress or not he has overstepped his constitutional right. Again rules and regulations may properly be made by the various departments with which, persons dealing with the Department

in matters to which those regulations apply, must comply, in order to be heard or to obtain that for which they are seeking.

Such orders and regulations may have the force of law in a sense, but they do not have the force of law so that the violation of such orders render a person criminally liable. In order to render a person criminally liable he must be guilty of a violation of some penal enactment emanating directly from the supreme legislative power.

It is obvious that unless the regulation of the commissioner of the General Land Office has the force of a criminal act emanating from Congress, the plaintiffs in error in this case could not be guilty of a conspiracy to suborn perjury in a matter wherein it was contemplated that the persons to be suborned should swear falsely to matters which were not required to be proved by the statute, but only by a regulation of the department.

In support of our contention, we cite United States vs. Maid, 116 U. S., at page 650, wherein it is held that a criminal offense against the United States cannot be predicated on the violation of the requirements imposed only by a rule or regulation of one of the executive departments of the government, and that to constitute the crime of perjury under Revised Statutes 5392 by the making of a false affidavit in relation to entry of public lands it is essential that such affidavit should be material, and that it should be authorized by a law of the United States. Such a charge cannot be based upon an affidavit of the non-mineral character of the land made in support of a homestead entry, although a regulation of the land office requires such an affidavit to be made in certain cases, since it is not required by Revised Statutes 2290, which prescribed the contents of a homestead af-

fidavit, and the statute cannot be added to for criminal purposes by a departmental regulation.

The case of United States against Maid just cited is strictly analogous to the one under discussion, and we think is decisive of the contention that we are making.

We further cite in support of our contention United States vs. Blasingame, 116 U. S. 654, wherein it is held that the provisions of the sundry civil service appropriation Act of June 4th 1897. (30 Stat. 11), making it a crime to violate any rule or regulation thereafter to be made by the Secretary of the Interior for the protection of forest reserves, is void as in substance and effect a delegation of legislative power to an administrative officer.

It is said on page 652 United States vs. Maid, supra, that "A department regulation may have the force of law in a civil suit to determine property rights, as in Cosmos Exploration Company vs. the Gray Eagle Oil Company ,supra, and yet be ineffectual as the basis of a criminal prosecution. U. S. vs. Eaton, supra. The Supreme Court of the United States in the case last cited marks the distinction thus:

"Regulations prescribed by the president and by the heads of departments under authority granted by congress, may be regulations prescribed by law, so as lawfully to support acts done under them and in accordance with them; and may thus have, in a proper sense, the force of law; but it does not follow that a thing required by them is a thing so required by law as to make the neglect to do the thing a criminal offense in a citizen, where a statute does not distinctly make the neglect in question a criminal offense."

In Dastervignes et al vs. United States, 122 Fed. Rep. p. 30 the Circuit Court of Appeals for the Ninth Circuit reached the

conclusion in a civil suit brought by the United States to enjoin the plaintiffs in error from herding and grazing sheep on the Stanislaus Forest Reservation, that the provision of the sundry civil service appropriation act of 1897 relating to forest regulalation and which authorizes the Secretary of the Interior to "make such rules and regulations and establish such service as will insure the objects of such reservations, namely, to regulate their occupancy and use and preserve the forest thereon from destruction, and which itself prescribes the penalty for violation of such regulations, is not unconstitutional delegating legislative power to an administrative officer."

It is to be noted that the Blasingame case, supra, was a criminal one and the case of Dastervignes was civil, and the two decisions are to be distinguished upon that ground.

There is, however, a wide distinction between the last cited case and the one under discussion. In the last cited case the law itself prescribed the penalty for the violation of the regulations.

It is universally held that Congress cannot delegate its legislative power so as to authorize an administrative officer, by the adoption of regulation to create an offense and prescribe punishment for its violation.

Statutes are sometimes held valid which prescribe a punishment for the offense which in general terms is defined by the statute, the regulation dealing only with the matter of detail and administration necessary to carry into efffect the object of the law.

The Dastervignes case, supra, does not determine the question which we are discussing.

In the first place, the act above quoted provides in Section 3 thereof what is necessary for the claimant to prove at the time of final proof and continues *that on the transmission to the*

general land office of the papers and testimony in the case a patent shall issue thereon.

The applicant is entitled to his patent on making certain proof under the statute.

The regulation provides proof in addition to the statutory requirement.

Further, Congress has nowhere undertaken to provide that it shall be a crime to violate the regulations made or to be made by the Commissioner of the General Land Office in this particular, and it has nowhere undertaken to denounce as perjury false swearing with reference to matters which the statute does not require shall be proved at the time of final proof under the timber and stone act, but which are required only by a regulation of the department.

Neither has the Commissioner of the General Land Office undertaken, nor has he the authority, to provide by rule or regulation that a person shall be guilty of perjury in swearing falsely to matters required by him in final proof under the timber and stone act not required by the statute.

No penalty is attached to swearing falsely in final proof under the timber and stone act, except that the taking of a wilful false oath concerning matters required to be proved by statute is denounced as perjury under Section 5392 of the Compiled Statute.

It follows that the defendants, in order to be guilty of subornation of perjury, must have conspired to induce some one to take an oath before a competent tribunal officer or person in a case in which *a law of the United States authorizes an oath to be administered*, etc.

We have seen no decision which would tend to establish the proposition that the regulation of the commissioner of the Gen-

eral Land Office is a law of the United States within the meaning of the phrase as used in Section 5392.

It was urged at the hearing that the case of the United States against Bailey U. S. 9th Peters 238, 9 Law. Ed. 113, was authority in support of the contention that the rules made by the Commissioner of the General Land Office had the force and effect of a law of the United States within the meaning of the phrase as used in Section 5392, Revised Statutes. We do not so understand the case. In that John Bailey was indicted for false swearing under 3rd Section of Act of Congress of March 1st, 1823 (Chapter 165) which provides that if any person shall swear or affirm falsely touching the expenditure of public money, or in the support of any claim against the United States he shall, upon conviction thereof, suffer as for wilful and corrupt perjury.

The indictment charged the false swearing to be in an affidavit before a Justice of the Peace of the Commonwealth of Kentucky in support of a claim against the United States under the act of Congress of the 5th day of July, 1832 (Chapter 173), to provide for liquidating and paying certain claims of the State of Virginia. The Secretary of the Treasury had established a regulation immediately after the passage of the last mentioned act for the government of the department, and its officers, in their actions upon the claims in said act mentioned. And among other things provided that affidavits made and subscribed before any justice of any of the states of the United States would be received and considered, etc., and the question was whether the said Justice of the Peace had authority or jurisdiction to administer the oath or take the affidavit. The Court held that the Justice had jurisdiction to administer the oath, saying that the act of 1823 did not create or punish the crime of per-

jury technically considered, but it created a new and susbtantive offense of false swearing and punished it in the same manner as perjury.

The oath therefore ned not be administered in a judicial proceeding or in a case where the state magistrate under the state laws had judicial jurisdiction so as to make the false swearing perjury. It would be sufficient that it might be lawfully administered by the magistrate and was not in violation of his official duty.

There was no express authority given by any law of the United States to any state magistrate to administer an oath in a case like the Bailey case. The Court held that the Secretary of the Treasury by implication possessed the power to make such regulation and to allow such affidavits in proof of claims under the act of 1832.

The Court says, after setting out the customs of the department, that Congress must have been presumed to have legislated under this known state of the laws and usage of the Treasury Department. And the act of 1823 is construed with reference to this usage. It is held that the act does no more than to change a common law offense into a statutory offense, it being stated "that it is clear that by the common law that the taking of a false oath with a view to cheat the government or to defeat the administration of public justice though not taken within the realm, or wholly dependent upon usage and practice, is punishable as a misdemeanor. The defendant in this case (Bailey case) is not charged with perjury, but with a violation of the statute which provides a penalty for false swearing," it being held that Congress in providing this penalty legislated in accordance with the custom of the Treasury Department in requiring affidavits and designating state officers who had authority

to administer oaths within the state as proper persons before whom the affidavits could be taken.

This case is authority for the proposition that Congress may prescribe a penalty for false swearing in matters wherein it is the custom for the Treasury Department to receive affidavits in support of claims against the United States, the legislation on this subject assumes that evidence under oath will be submitted in support of the claims. In the Bailey case the Congressional act prescribed the penalty but did not denounce the offense as perjury. Under the common law it was an offense to file a false affidavit in support of a claim against the government, although taken outside of the realm, but the offense was not perjury, neither was it so made by the act above mentioned.

The proceeding in the Bailey case was under the statute creating the offense and not under the statute defining perjury.

In further support of our contention, we cite United States vs. Bedgood, 49 Fed., commencing on page 54.

Bedgood was charged with perjury and alleged to have been committed in making a pre-emption proof, and the Court in holding that the oath required was extra judicial in that the alleged false oath consisted in swearing falsely to matters not required by statute to be proven makes use of the following language:

See bottom of page 58, top of page 59.

Congress having expressly declared what officers are authorized to take affidavits and administer the oaths required by law in pre-emption entries and having expressly prescribed what statements the affidavit of the pre-emptionist shall contain, neither the commissioner nor the secretary has the legal authority to designate other officers before whom such oaths may be taken

or to prescribe the existence of other facts than those required by the statute. The law makes the existence of certain facts and oath thereof the only prerequisite to demanding a particular right, and oath of other facts in connection therewith, however false, is not perjury, and this is said on the theory that the commissioner may have made regulations prescribing what shall be contained in the affidavits.

In a late case arising in the District of Washington in a case wherein the United States was plaintiff and Ott and Williamson were defendants, Judge Hanford held that perjury could not be predicated upon an affidavit which is required only by regulation of the Interior Department; that perjury could not be assigned on such an affidavit. The case was tried before a jury and is not reported.

In the case of Caha, plaintiff in error, vs. United States, U. S., 152 U. S. 211, 38 Law. Ed. 415, the plaintiff in error was convicted of false swearing in a land office contest case with respect to a homestead entry; the Supreme Court affirmed a conviction on the ground that contest before the local land office had been recognized by Congress so that it was a competent tribunal.

The Court expressly says, that in the Caha case "No violation is charged of any regulation made by the Department. All that can be said is that a place and an occasion and an opportunity were provided by the regulations of the department, at which the defendant committed the crime of perjury in violation of Section 5392."

In the Caha case, although contests in a homestead entry had not been expressly provided for by statute, yet they had been recognized by congress, hence the tribunal was a competent one.

In further support of our contention, we cite

Morrill vs. Jones, 106 U. S. 466 467, 27 L. Ed. 267, 268.

In this case it is said that the Secretary of the Treasury cannot alter or amend a revenue law, and all that he can do is to regulate the mode of proceeding to carry it into effect.

U. S. vs. Eaton, 144 U. S., 677, 36 L. Ed. 591, is also cited.

This case holds that a dealer in oleomargarine is not guilty of a public offense on account of a violation of a regulation made by a Commissioner of Internal Revenues as the law itself did not prescribe the duties which the dealer failed to perform.

We quote from the opinion in the Eaton case the following:

It was said by this court in Morrill vs. Jones, 106 U. S. 466, 467 (27: 267, 268), that the Secretary of the Treasury cannot by his regulations alter or amend a revenue law, and that all he can do is to regulate the mode of proceeding to carry into effect what Congress has enacted. Accordingly, it was held in that case, under 2505 of the Revised Statutes, which provided that live animals specially imported for breeding purposes from beyond the seas should be admitted free of duty, upon proof thereof satisfactory to the Secretary of the Treasury and under such regulations as he might proscribe, that he had no authority to prescribe a regulation requiring that, before admitting animals free, the collector should be satisfied that they were of superior stock, adapted to improving the breed in the United States.

Much more does this principle apply to a case where it is sought substantially to prescribe a criminal offense by the regulation of a department. It is a principle of criminal law that an offense which may be the subject of criminal procedure is an act

committed or omitted "in violation of a public law, either forbidding or commanding it."

4 *Am.* & *Eng. Enc. Law*, 642; 4 Bl. Com. 5.

See further

U. S. vs. Certes, 107 U. S. 671 (27:334).

U, P, Co, Manion 48 Fed 800

The foregoing cases discuss the general question involved and furnish numerous illustrations of the application of the principal contended for, and we think are sufficient to establish our position.

The prosecution endeavored to show that there was a conspiracy on the part of defendants to suborn perjury at the time of final proof, and the bill of exceptions is full of this evidence.

The Court also instructed the jury in such a manner as to authorize it to base a verdict of guilty if they should find a conspiracy to suborn perjury at the time of final proof raised by assignment of error 101, the instruction complained of being found on page — of the record.

Another instruction to the jury under assignment of error 100 found on page — of the record raised a like question.

And again a like instruction under assignment of error 101 found on page — of the record.

The Court refused to give the following instruction in this case:

"The indictment charges conspiracy to suborn perjury in the matter of the sworn statement or application and not in the matter of final proof."

This instruction is found on page 1487 of the record.

The final proof of John Watkins was admitted in evidence. See page 381—388 of the record.

There was also admitted in evidence over the objection and exception of the defendant the final proof of a large number of persons, being of like tenor and effect as that of John Watkins, namely, Joel, Calavan, Christian Fuerhelm, Laura Biggs, Ora F. Parker, Sarah Parker, Robert G. Foster, Mrs. Foster, Josiah Graves, Monia Graves.

The Court admitted final proof and *cross-examination* of each of said persons and the cross-examination of the said John Watkins on final proof.

These objections are presented by assignments of error 22 and 43, and others, and are found on the following pages of the record. 382-515-828

It is useless to point out the evidence which the prosecution offered tending to show conspiracy to suborn perjury at the time of final proof as it involves nearly all of the witnesses, and there can be no question but that if an error was committed in this particular it was vital to the case, and should result in a reversal.

IT WAS ERROR FOR THE COURT TO CHARGE THE JURY AS FOLLOWS:

"THE CHARGE IN THE INDICTMENT IS THAT THERE WAS AN AGREEMENT BETWEEN THE DEFENDANTS GENERAL IN ITS CHARACTER TO SUBORN A LARGE NUMBER OF PERSONS TO COMMIT PERJURY. AN AGREEMENT TO SUBORN ONE OR TWO PERSONS ONLY WOULD NOT SUSTAIN THE INDICTMENT EVEN IF PROVEN."

The Court not only refused the above instruction, but gave one which implied to the contrary of the requested instruction. These questions are covered by assignments of error Nos. 105 and 121, and the instruction requested and refused is found on page 1480 of the record, and the one given is found on page 1453 of the record.

There was a large amount of testimony introduced bearing upon this question, and in many cases it was clear that no perjury was intended to be suborned, and in other testimony an inference might be drawn that perjury was to be suborned.

See the testimony of Calavan, page 557 of the record.

Calavan testified that he was told by Dr. Gesner that he was under no obligation to sell to him.

Again, the inference might be drawn from Ben Jones' testimony that the intention was that he should knowingly swear falsely.

See testimony of Jones, page 163 of the record.

In short, the testimony was of such a nature that the jury might have believed that the conspiracy involved the suborning of one or two persons. The evidence above referred to is given as a sample. The reference to testimony might be indefinitely ex-

tended without serving any useful purpose. The trial judge under this state of the evidence considered it to be the law that the defendants would be guilty if the conspiracy referred to one or two persons only. We submit that it would be an improper identification of a offense to charge that two or more persons conspired to suborn a large number of persons, to-wit, 100 persons, if in fact the conspiracy referred to only one or two.

Any person reading an indictment charging defendants with conspiracy to suborn one or two persons, and another indictment charging the same persons with a conspiracy to suborn a large number of persons, namely 100, would understand that different conspiracies were referred to.

A conspiracy to suborn one or two persons is not a conspiracy general in its nature, but limited, while the conspiracy charged in this case is general and involves an agreement to suborn 100 persons.

See Wharton Criminal Law, Vol. 2, 1396, 9th Ed.

ERROR IN PERMITTING THE WITNESSES TO GIVE THEIR "UNDERSTANDING" AS TO THE ARRANGEMENT BETWEEN THEM AND GESNER ABOUT LAND.

A number of applicants, after detailing the conversation between them and Dr. Gesner about taking up the land, were permitted over the objection of the defendants, that it was incompetent, immaterial and called for conclusions of the witness, to give their inferences or understanding as to the effect of the arrangement.

The following are samples of these examinations: Christian Feuerhelm who was one of the applicants (after testifying to the application, etc.), and the talk with Gesner, was asked the following question: "What was your understanding when you you left Gesner and when you filed on a clai mas to whether you had promised that you would let him have it when you got the title?"

A. Well there was no real promising.

Q. You didn't say that?

A. No, sir.

Q. *But what was your understanding as to what you believed and what he believed?*

To which the defendants objected as incompetent and immaterial, calling for a conclusion of the witness and not binding upon the defendants, but the objection was overruled and the defendants excepted and the witness answered, "I believed nothing else, but I went in to file on the claim."

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So the witness Calavan after having testified that he was a school teacher and lived in that locality and after having related in detail the talk he had with Biggs before he went up to see Gesner, testified as follows:

Q. "Did you have any talk with Mr. Gesner before you filed?

A. Yes, sir.

Q. Where was that?

A. That was, I think, on the street, near the First National Bank.

Q. In Prineville?

A. Yes, sir.

Q. And when was it with reference to the day you filed?

A. Why, I think it was a day or two before I filed.

Q. Now, what was that talk?

A. Why, I asked him—I hadn't made any talk with him about the proposition, and I was asking him about what he would do, and he said the claim would be worth $500, or he would give $500 for it when patent issued. But he says 'you will be under no obligation to sell to me.'

Q. What further was said?

A. That was all, I think. That is all I remember.

Q. Was anything said about the mortgage?

A. Yes, I believe there was. I think I asked him if he wanted a mortgage, and he said he didn't want a mortgage on our claims. I told him if he did, why, I wouldn't locate.

Q. Was anything said about why he wanted the claim filed on?

A. Why, I think he told me that he wanted to protect his range from other stockmen."

He was then asked this question:

"What was *your understanding* at the time as to what the terms were on which you were taking it up?"

To which the defendant objected as calling for a conclusion of the witness and incompetent and not binding on the defendant in any way, but the objection was overruled and the witness answered:

"Why, I understood that I was to receive $500 for the claim when the patent issued."

Q. "And it was your intention at the time you were making that filing to convey it for $500 as soon as you got the patent or what was your intention in respect to it?

A. My intention was to convey it to them when I got the patent.

Q. To whom?

A. To Gesner."

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The witness Crane, having testified as to the talk with Gesner in detail and as to his intention to let Gesner have the land, was asked this question:

"What was *your understanding* as to whether you had promised to do that or not?"

To this defendants objected and the Court ruled that he might state his belief, to which ruling the defendant excepted and the witness was then asked:

"What do you believe?"

To which the defendants objected as irrevelant, incompetent and not binding on the defendants in an yway, but the defendants' objection was overruled and defendants excepted, whereupon the witness answered:

"Well, I would have felt that way If I had went ahead and

proved up on the land and they had furnished me the money to do it with."

Whereupon the witness was asked the following question: "Was that your understanding of it?"

To which the defendants objected as calling for the understanding of the witness, but the objection was overruled and the defendants excepted, whereupon the witness answered:

"Yes, sir." Printed record page 358

So the question was asked of witness Hudson:

Q. "What did you understand at that particular time as to whether you had agreed to sell it to Gesner or not?"

Printed record page 467

It is submitted that it is too well settled to admit of any serious question that this was error and that a witness cannot be permitted, after giving his statement as to what was said and done, toadd to it his inference or conclusion or understanding as ttohe effect of what was said.

In Whitemore vs. Ainsworth, a California case in 38 Pac. 196, the witness had stated a conversation and then was asked:

Q. State whether or not defendant wanted you to do anything?"

Held properly excluded as calling for a conclusion, the Court saying:

"The action of the Court in confining the witness to a statement of facts as they occurred rather than an expression of opinion as to what was wanted, was proper."

In the very late Indiana case of Deal vs. The State, 157 Ind.

549, 62 N. E. 51, the following question was asked of a witness who had heard a conversation:

Q. "What was *your understanding* from the conversation between Leach and Deal and yourself as to what relation he bore to this woman, whether husband or otherwise?"

The witness answered, "Well, I got the understanding that they were man and wife."

The Court says:

"In permitting this witness to give to the jury his mere understanding which he obtained from the conversation referred to in the question propounded by the State, counsel for the appellant contended that the court erred. In this contention we concur * * * It would seem unnecessary to refer to authorities in support of the well settled rule that a witness, as a general proposition, must be confined to the statement of facts and cannot be permitted to indulge or give in evidence *his mere conclusions, opinions or understanding.* It was the privince of the witness under the circumstances, to state th the jury what was said by the appellant or in his presnce in respect to the subject in issue and leave it to the jury to draw their own inferences from his statement:

In State vs. Brown, 86 Ia. 121, 53 N. W. 92, the witness had been permitted to give his understanding from a conversation about which he had testified. The court held it incompetent and irrevalent, saying:

"The understanding of the witness may not have been justified by the language used, between the defendant and in no view of the case was it properly received in evidence."

So in Plano vs. Kautenburg, 96 N. W. 734, decided by the same court in 1903, the witness had been permitted to state that the defendant "understood fully" in relation to his representa-

tions, giving his reasons therefore, and this was held incompetent and the judgment reversed.

In Crowell vs. Bank, 3 Ohio St. 411, the witness had been permitted to give his understanding of a conversation between the parties, and the court says:

"It appears that the plaintiff belo wwas not content with the statements of the defendants tending to maintain the action; but after the witness had related the conversation of the parties, he was further interrogated, and required to state his *understanding* or *inference* from the conversation, as to the *understanding* or *meaning* of the parties. * * * But to allow a witness, after having narrated a conversation of one of the parties, to be interrogated (and that, too, by the party calling him, notwithstanding the objection from the other side), and to state his consclusion or understanding from the conversation as to the meaning or understanding of the parties holding the conversation, would be a *most dangerous relaxation of the rules of evidence,* unwarranted by any reported decision which has fallen under our observation."

In Hewitt vs. Clark, 91 Ills. 608, the Court says:

"The safe mode of proving an agreement by parol is to require the witness to state what was said, if anything, by either of the parties in the presence of the other on the subject If a witness cannot give the words of the party he may undoubtedly be permitted to state the substance of what was said. He ought not, however, to be allowed to substitute his inferences from what was said or his understanding. To permit a witness to answer such a question, 'it is my understanding, etc.,' is erroneous."

To the same effect are Peterson vs. State, 47 Ga. 524; Shepherd vs. Pratt, 16 Kan. 211; Whitman vs. Frees, 23 Maine

187; Ives vs. Hammond, 5 Cush. 535; Peerless vs. Gates, 61 Minn. 124; Brady vs. Brady, 16 N. H. 431; People vs. Sharp, 107 N. Y. 461, 14 U. E. 319; Goodman vs. Kennedy, 10 Neb 2774.

And this has been the universal holding of the Federal Courts.

In Foster vs. Murphy, 135 Federal 51, Cox, judge, delivering the opinion of the Circuit Court of Appeals for the Second Circuit, says:

"After having exhausted himself as to what was said it was clearly incompetent for him to characterize the testimony. Whether a new contract was made was a question for the jury and not for the plaintiff to answer."

In Re Weisenburg, 131 Fed. 524, the question was asked of a cashier of a bank as to whom credit was given in a certain transaction. The Court says:

"The question as to whom credit was given and from whom payment was expected could be determined only from the facts of thetransaction, i. e., what was said and done before and at the time the notes were executed and discounted. It would not be affected by any testimony of Discoll as to what *his notions in regard to the matter were.*"

In Gentry vs. Singleton, 128 Federal 680, one Cooner had sold certain cattle and the question was as to whom he had sold them. He had stated what was said and done and then he was asked the question, "Who *did you understand* you were selling the cattle to?" This was held improper, the Court saying:

"The inference or understanding to be drawn from what occurred at that time is to betermined by the court or jury, and the unexpressed thought or understanding of the witness was wholly immaterial."

There never was a case in yhich the understanding of a witness was more dangerous or prejudical than this one. These witnesses, according to the theory of the government, had committed perjury and were subject to an indictment at the will of the government. There was every inducement for them to make their testimony satisfactory to the government. They should have been confined to a statement of the facts to what was said and done. Their undisclosed and unexpressed understanding was in no way binding upon the defendants. It was evident that many of them had no clear idea as to the transaction.

The line between an honest transaction and a dishonest one in the dealing with timber land is a fine one and largely involved. The court below held, and properly so under the authorities, that a man has a right to let it be known in a locality that he is in the market for timber and the price which he is willing to pay—to induce locators to take up timber and loan them money for that purpose so long as re does not make an actual contract to purchase the land.

And the locator on the other handhas a right to take the land with the intention of selling it to a purchaser and even with a prospective purchaser in view, as long as he makes no actual contract.

U. S. vs. Budd, 144 U. S. P. 154.

A man might be perfectly honest in his attempt to follow the law and might indeed keep squarely within the law in what he had a right to do and yet the line is so close that the misunderstanding of an applicant as to what the effect of the

transaction really was, might readil ythrow it over the line from an honest to an apaprently dishonest transaction.

For all these reasons it was vital that the actual facts should be presented to the jury, and that the jurors and not the witness should draw the inferences as to what the transaction really was.

ERROR IN PERMITTING WITNESSES TO STATE THEIR UNDISCLOSED INTENTIONS AT THE TIME OF MAKING THEIR APPLICATIONS AND AT THE TIME OF FINAL PROOF.

Each of the applicants were permitted to state, over the objection of defendants, what *his intentions* were as to the disposal of the land.

When the witness Ben Jones was on the stand after testifying to the talk with different defendants, and as to what was done, he was asked:

"Now, at the time you signed it and swore to it(the application) did you intend to convey this land to *Dr. Gesner* for the

consideration named by him to you, as testified by you, as soon as you obtained the title thereto?"

To which the defendants each separately objected as incompetent and immaterial and not binding upon them in any way. The objection was overruled and the witness answered:

"Yes, sir." Record page 161

And, again, in relation to the final proof, the witness was asked:

"Mr. Jones, at the time you subscribed this final proof paper, what was your intention with reference to this land as to what you would do with it when you obtained title?"

And was permitted to answer:

"Let Gesner have it." Record page 161

The witness Evans, who was also an applicant, was asked the following question:

"Now, at the time you signed that paper, what was your intent as to what you would do with the land when you secured a patent to it?"

To which the defendants objected on the ground that it was incompetent, immaterial and not binding upon them. The witness was permitted to answer:

"Well, of corse, I calculated to sell it and I supposed that Mr. Gesner would take the land."

Q. "For what consideration?"

A. Well I supposed he would give me $500 for it.

Q. Was it your intention at the time you signed to carry that out?

A. Well, I intended to take that for it if I could not get anything more out of it.

Q. Did you tell him that?

A. No, I didn't." Record page ——

So the witness Fauerhalm when on the stand was asked:

"At the time you filed, did you intend to let Dr. Gesner have the land when you got the title?"

To which defendants objected as incompetent, immaterial, calling for a conclusion of the witness and not binding upon them. The objection was overruled and the witness answered:

"I guess I thought so.' Record page 516

East of the applicants were asked similar questions.

Testimony of Beard, page 224

Testimony of Watkins, page 286

Testimony of Calavan, page 352

Testimony of Hudson, page 461

Now, if the charge had been perjury, or subornation of perjury, there might have been some reason for this proof, as the intention of the parties might have become a substantive element of these offenses. But here the crime, if committed at all, was the *prior combination and agreement.*

It was not what the *applicant* intended at the time of his application, but what the *defendants intended*—what they had previously planned—if any thing, which controlled.

The actual commission of perjury was in no way an element of the offense charged.

Of course, the acts of the conspirators *themselves*, in carrying out the conspiracy, are always proper—either as overt acts or asthrowing light upon their original intention or plan.

But as we have said, it was *their* intention and not that of the applicant which was material in this case.

The intention of the applicant was the product of his own brain, sequestered in his own mind, and whether good or bad, the defendants' *prior plan* could not be judged thereby. If the applicant disclosed his intention to the defendants, then what he said and done—in their presence and with their knowledge—might beevidence against them, because it colored their own acts and thereby threw, perhaps, a back light upon their original intention and plan.

But the unexpressed intention of the applicants rested in their own hearts, and the defendants ought not to be made responsible therefor.

If any of the applicants had a corrupt intent to commit perjury, the defendants could not justly be prejudiced thereby or found guilty of a previous plan, because of such subsequent and unexpressed intent of the applicant.

THE COURT ERRED IN ADMITTING EVIDENCE AS TO THE ALLEGED FALSITY IN THE APPLICATIONS OF THE VARIOUS PERSONS, THAT THE INDICTMENT ALLEGES PLAINTIFF IN ERROR WAS TO SUBORN, TOUCHING THE QUESTION OF WHETHER THE LAND APPLIED FOR WAS MORE VALUABLE FOR TIMBER OR OTHER PURPOSES. THE COURT ALSO ERRED IN ADMITTING EVIDENCE TENDING TO SHOW THAT THE LAND THAT EACH OF THE DEFENDANTS APPLIED FOR WAS LESS VALUABLE FOR TIMBER THAN FOR GRAZING PURPOSES.

Over the objection and exception of the plaintiffs in error the government was allowed to introduce evidence tending to show that the timber was of comparative small value upon the land applied for by the various entrymen, whom it was alleged plaintiffs in error sought to suborn.

Th evidence introduced on this question bore upon the truth in the written statement and final proofs introduced in evidence.

Evidence was introduced tending to show that most if not all, of the land described in the indictment, wherein the alleged overt acts of Biggs are set out, was less valuable for timber than for grazing purposes. We insist that this was error, inasmuch as the indictment not only did not charge that there was any conspiracy involving the subornation of perjury concerning the character of the lands to be entered, but on the contrary it was alleged that the various applicants at the time perjury was to be committed would be applying to enter and purchase the land which would be open to entry under the acts of Congress approved June 3rd, 1878, and August 4th, 1892, *and known as timber and stone lands*, the point of the evidence being that the

land was more valuable for grazing purposes than for its timber.

It is to be borne in mind that the evidence under consideration was offered in order to establish in some way the truth of the charge contained in the indictment that the defendants conspired to have persons swear falsely when applying to enter lands more valuable for timber and stone than for other purposes, and that the false oath to be taken in the contemplation of the conspiracy consisted in the statement that the applicant was applying to purchase for his own use and benefit, etc.; that he had not made a contract whereby the title might inure to the benefit of any other person or persons, when in truth he had made a contract whereby the title should inure to some other person.

There are three sets of persons referred to in the proof tending to show that the land was less valuable for timber than for other purposes, namely, the nineteen persons who are mentioned in the indictment wherein it is charged that Biggs committed an overt act in preparing a sworn statement for the signature of each of said nineteen persons. It being alleged that each of said nineteen persons was a person to be suborned; second, persons who were to be suborned, but unmentioned in the alleged overt acts of Biggs; third, the defendants themselves, Biggs, Williamson and Gesner.

The conspiracy itself according to the allegation, contemplated that subornation of perjury should take place only when *lands subject to entry under the timber and stone acts were being applied for.*

The defendants were convicted upon evidence which bore upon the question of whether or not there was a conspiracy to suborn perjury in proceedings wherein persons were applying to enter lands under the timber and stone act, which were not subject to entry under that act.

The government was allowed to secure a conviction on one charge by evidence tending to show another offense.

The government could convict only by showing that some one of the overt acts charged against Biggs was actually committed by him for the purpose alleged. It offered evidence tending to show that the land described in the alleged overt acts was of less value for timber than for other purposes, that is, it offered evidence tending to show that the land therein described was not subject to entry under the timber and stone act.

How, under the contention that the government was making, could the jury have found that the alleged overt acts were committed by Biggs for the purpose of effecting the object of the conspiracy, which involved subornation of perjury only in the entry of lands subject to entry under the act?

As to the persons whose names were not mentioned in the overt acts but who were to be suborned according to the contention of the government, we have to say, that the evidence on the part of the prosecution shewed that the conspiracy as to them involved subornation of perjury in an application to enter land not subject to entry under the timber and stone act, and consequently could not have referred to the charge in the indictment, and yet this evidence was submitted to the jury on the theory that it in some way tended to prove the charge in the indictment, and further the theory of the government's case at other times, was that a conspiracy to suborn perjury in applying to enter lands not subject to entry was the conspiracy charged in the indictment.

The evidence that bore upon the character of the land entered by the defendants themselves should be considered separately. There is no charge that the defendants had entered into a conspiracy to suborn themselves, neither is there any allegation

in the indictment that the defendants ever applied to purchase any land.

In the evidence complained of the government was allowed to offer testimony tending to show that the defendants did not enter into the conspiracy as alleged in order to establish a plan on the part of the defendants to do as alleged.

For defendants did not enter into the plan as alleged if, as contended by the government in this evidence, the land was not subject to entry.

This is not a case where evidence is offered of a different conspiracy in order to show the existence of the conspiracy charged for the land upon which the government sought to show there was little or no timber is the very land that the prosecution claimed was involved in the entries wherein perjury was to be suborned.

The legitimate effect of such evidence would be to show that the conspiracy upon which the proof bears is not the one for which defendants were on trial, but the real effect was to prejudice the defendants, and to permit a conviction on the charge in the indictment by permitting proof tending to show some other defense.

The jury might have convicted all of the defendants on the theory that they were guilty of conspiracy to suborn perjury in the entry of lands not subject to entry under the timber and stone act.

There is no necessity for a citation of authorities to support the proposition that an indictment charging a conspiracy to suborn perjury in proceedings wherein applications were being made to enter timber and stone lands subject to entry, is unsupported by proof of subornation of perjury in proceedings to enter lands not subject to entry under said act. An acquittal under one

In support of the proposition that the admission of such evidence is error, we refer the Court to that portion of our brief where a question of like nature is fully discussed.

The evidence introduced on the subject now under discussion is voluminious and consisted of photographs taken by witness McAlpin, whose testimony is to be found on page 626-649 of the record, and the testimony of witness Mitchell, whose testimony relating to this matter is to be found on pages 744-755 of the Record, and the testimony of witness Murray, whose testimony is to be found on pages 726-731 of the Record, and the testimony of witness Keenan, whose testimony relating to this matter is to be found on pages 1342 of the Record.

There is also other evidence on this same question shown by the Record, but the evidence of the witnesses named covers practically the whole subject.

Some answers covered whole townships, including much of the land applied for, like that of witness Keenan, page 1342 of the Record, when he testified to the general character of Township 15, S. 19, East(This township contains the land applied for by thirteen of the nineteen persons mentioned in the alleged overt acts of Biggs).

Witness Edgar made an answer covering a whole township on page 685 of the Record, whose testimony given at length on this subject, is printed on pages 682-717 of the Record.

The land was gone over by legal subdivisions and testimony given as shown by the record above referred to tending to show that the land was not subject to entry under the timber and stone act on account of the scarcity of timber and its value for grazing purposes.

As elsewhere mentioned, there were a large number of applications introduced covering the land concerning which the above tstimony was given touching the amount and the character of timber thereon, also a number of final proof papers were introduced in evidence, as elsewhere mentioned, covering a part of the same land.

There was a conflict in the statements contained in the said applications and final proofs on the one hand, and the above testimony on the other, as the applications each and all stated that the land was in effect subject to entry under the timber and stone act and the final proofs supported the applications in this particular.

ERROR IN THE ADMISSION OF EVIDENCE TENDING TO SHOW THAT ONE OR MORE OF THE DEFENDANTS HAD FRAUDULENTLY ACQUIRED SCHOOL LANDS, INCLUDING (1) ITS COMPETENCY, (2) ITS ADMISSION IN REBUTTAL, (3) THE RECALL OF THE DEFENDANT GESNER AND HIS CROSS-EXAMINATON IN RELATION THERETO AFTER THE STATE HAD ENTERED UPON ITS OWN REBUTTAL CASE, (4) IMPROPRIETY OF SUCH EVIDENCE FOR THE PURPOSE OF IMPEACHMENT.

The prosecution was permitted over the objection of each of the defendants to offer evidence against defendants Gesner and Williamson, tending to show the defendant Gesner had tried to induce one Perry to apply to the State of Oregon for school land for his benefit, and also evidence tending to show that he had induced one Mary Swearingen to file on state lands and that she had made the necessary affidavit and filed on the land and afterwards transferred it to *their* firm.

This evidence was offered as *rebuttal* and upon the theory of impeachment of the witness Gesner, and for the alleged purpose of laying a foundation for impeachment in that regard, said defendant was recalled and compelled to take the stand and testify in relation thereto in cross-examination, *after the defendants had rested their case and the prosecution had entered upon its rebuttal.*

In relation to the Perry incident, Mr. Perry being called in rebuttal, was asked the following questions and the following proceedings were had:

Q. Mr. Perry, in Prineville, between the 15th and 25th of June, 1902, did Dr. Gesner ask you to sign a school land application and an assignment to the firm of Williamson, Wakefield & Gesner or Williamson & Gesner, and did you ask him where the land was, and did he tell you it was up in the Horse Heaven country; and then did you ask him what there would be in it for you, and did he answer $50? And did you then tell him if you took up any school land, you would keep the land for your own use, and did you start t o walk off, and did he then say, it would be no trouble, "All you would have to do would be to go to the office and sign a paper."

Mr. Bennett: We object to that as incompetent, immaterial, not proper rebuttal, and not a proper impeaching question, not inconsistent in any way with the testimony he has given on the stand in his direct case, and therefore not a proper subject for impeachment; and because there is no sufficient foundation laid, because there was no statement in the question asked of the witness (Gesner) as to who was present, and no definite statement as to the time when it occurred.

Objections overruled: defendants except.

A. I had a conversation with Dr. Gesner, but I am lost as to the date; I could not say as to the date you speak of.

Q. How do you fix the date, how near do you fix the date?

A. Well, my impression is that it was in June, 1902, but I am not positive.

Mr. Bennett: What was that last?

A. I believe that it was in June, 1902, that the conversation was had between Dr. Gesner and me.

Q. Is it your best recollection that it was in the latter part of June?

Objected to as leading.

A. It was sometime between the 10th, 24th or 25th; somewhere about that time.

Q. Now answer the question.

Mr. Bennett: I renew our objection, that the foundation has not been laid and for the other reasons.

Objection overruled; defendants except.

A. The conversation that occurred between Dr. Gesner and myself occurred in front of Temple's drug store. He asked me this question, "if I didn't want to take up a piece of school land?"

Mr. Bennett: We object to that as not proper.

Objection sustained.

Q. Answer yes or no, if you can, as to whether that conversation I have repeated took place in substance—that conversation in substance and effect?

A. Yes, sir, it did.

Mr. Bennett: We move to strike out the testimony of this witness upon the grounds as are stated in the objection heretofore made.

Objecions overruled; defendants except.

Record Page 1316

In relation to the Swearingen matter Mrs. Swearingen was called as a witness and shown an application to purchase the school land in question from the State of Oregon. This application was not sworn to before Biggs, but before J. J. Smith, County Clerk, Crook County, Oregon. The affidavit attached was as follows.

State of Oregon,

ss.

County of Crook.

I, Mary J. Swearingen, being first duly sworn, say that I am over eighteen years of age; that I am a native born citizen of the United States; that the proposed purchase is for my own benefit and not for the purpose of speculation; and that I have made no contract or agreement, expressed or implied, for the sale or disposition of the land applied for in case I am permitted to purchase the same, and that there is no valid adverse claim thereto.

MARY J. SWEARINGEN.

(Signature of applicant.)

Subscribed and sworn to before me this 24th day of June, 1902.

J. J. SMITH,

County Clerk, Crook County, Oregon.

And was asked the following question:

Q. Will you state to the jury the circumstances under which you signed that paper, how you came to do it?

Whereupon each of the defendants objected upon the ground that it was immaterial ,irrelevant, tending to drag in collateral matters and not proper rebuttal. Whereupon the District Attorney proposed to limit this testimony to defendants Williamson and Gesner.

Whereupon the defendants Williamson and Gesner each objected upon these same grounds, and upon the ground that the defendants are charged with conspiracy between the three of them to suborn perjury in the matter of government land, and that this proof, referred to state land in which Williamson and Gesner were alone concerned and is entirely a separate matter in which it is only claimed that two of the defendants were concerned, and where any oath taken would be before some entirely

different officer; but the objection was overruled and to said ruling each of said defendants excepted; whereupon the witness answered:

"Well, there isn't much to it. The doctor just came down and asked me if I would file on a piece of school land; so I told him I would."

Juror: I can't understand you.

A. I say that he came and asked me if I would file on a piece of school land. I told him that I would. I went there and filed on the land. He was to give me $25 for filing on the 160 acres, as well as I remember; I don't remember just the amount. So I went before the County Clerk, Mr. Smith, and I filed on the school land.

Whereupon the following questions were asked and answered, subject to the same objection, ruling and exception:

Q. Now, just what did he say when he said he wanted you to file on it, just what did he say? Tell the whole thing.

A. Well, I don't remember just how it was.

Q. No; but the substance of it as you can recollect it.

A. Well, just as well as I remember, he came down and he said that he would give my daughter and I $50 to file on a quarter section or a half section—something—I don't remember the amount; but, anyway, when the time came and we went to the clerk's office, part of it had been taken or he didn't want part of it—something like that, or they didn't say it was for him at all. Just asked us to file on it. And so my daughter didn't file. I filed on it and he gave me $25.

Record page 1326

The prosecution also offered a copy of the application of one Mrs. Gerowe, a sister of defendant Gesner, to purchase state school lands. The application in this case was not filed or sworn to before defendant Biggs but before a notary public at Spokane, Wash. The affidavit was as follows:

State of Washington,

ss.

County of Spokane.

I, Sarah M. Gerowe, being first duly sworn, say that I am over 18 years of age, that I am a citizen of the United States, that the proposed purchase is for my own benefit and not for the purpose of speculation; that I have made no contract or agreement, expressed or implied, for the sale or disposition of the land applied for, in case I am permitted to purchase the same, and that there is no valid adverse claim thereto.

SARAH M. GEROWE.

Subscribed and sworn to before me this 26th day of June, 1902.

STANLEY HALLETT,

Notary Public in and for the State of Washington.

Record p. 1308

Also a certified copy of a deed from the State Land Board to Williamson, Wakefield & Gesner for the same land, bearing date the 12th day of August, 1902, and a certified copy of the letter hereinbefore specified.

The proceedings in relation to the cross-examination of Gesner and the foundation laid for his impeachment in relation to any of these matters were as follows:

After the defendants had closed their testimony and rested their case, the government called Mr. L. T. Perry as a witness on rebuttal, but before Mr. Perry had responded or taken the stand, the prosecuting attorney announced that he desired to recall the defendant Gesner, whereupon the following proceedings were had:

Mr. Bennett: As your witness?

Mr. Heney: No, I do not desire to call him as my own witness. I want to ask him one more question on cross-examination.

Mr. Bennett: In relation to what matter?

Mr. Heney: In relation to this letter of June 23. I forgot whether I asked him about that letter or not.

Whereupon the defendant on behalf of the defendant Gesner and the other defendants, objected to his being recalled for that purpose, but the Court ruled that he must take the witness stand, whereupon said defendants excepted to his being compelled to take the stand in relation to the matter at that time, and said witness took the stand in compliance with the order of the Court.

Q. Dr., I will ask you to examine that certified copy of those letters, and you can examine the certificate also. The letter referred to was as follows:

Prineville, Ore., June 23, 1902.

M. L. Chamberlain,

Salem, Ore.

My Dear Sir:

Inclosed find check for $80 payment on the west half of Section 16, T. 15 S. R. 19 E., containing 320 acres. My sister, Mrs. S. M. Gerowe, will forward the application as soon as she can sign it. Who has the SE 1-4 of that section. Is it paid

up on or is it subject to a new filing. Please let me know at your earliest convenience.

I remain,
Yours respect.
VAN GESNER.

To which said defendant Gesner and each of the other defendants then and there objected upon the ground that it is not proper cross-examination and not proper rebuttal, and because it compels the defendant to testify in relation to a matter after he has left the stand and his cross-examination closed, and the defendants' case rested. But the objection was overruled and said defendants and each of the defendants excepted. Whereupon the witness answered, "I guess I wrote that letter."

Q. You think you wrote that letter?

A. Yes.

Q. And received the reply that is attached there?

A. I don't remember the reply; I don't remember anything about that.

Q. But you remember writing the letter?

A. I remember writing some letters there.

All of which went in under the defendants' objection as aforesaid. The reply referred to is as follows:

June 25, 1902.

Van Gesner,
Prineville, Ore.

Dear Sir:

I am in receipt of yours of the 23rd instant enclosing draft for $80.00 first payment on the W. 1-2 of Section 16, T. 15 S. R 19 E. This tract is vacant. If application is received from Mrs. Gerowe before any other application is received for the land, certificate will issue to her, but if regular application is re-

ceived, accompanied by required deposit before application is received from Mrs. Gerowe, we will be compelled to issue certificate to the party so applying.

The S. E. 1-4 of this section was sold to E. W. Barnes certificate No. 12389 and this certificate is not subject to cancellation.

Yours truly,
M. L. CHAMBERLAIN,
Clerk of the Board.

Record pages 1306-1314

And thereafter one L. T. Perry was recalled on the part of the government in rebuttal, and was asked the following question:

Q. Mr. Perry, did you have a conversation with Dr. Gesner in Prineville, in 1902, in relation to school lands?

Thereupon the defendants objected to said question as not proper rebuttal and as irrelevant.

Whereupon the Court asked whether defendant had been asked on his cross-examination regarding this conversation.

Whereupon Mr. Heney said, "I do not recall whether I asked him that or not, your Honor. I aimed to ask him. I will ask permission to recall the doctor and ask that question now.

Whereupon said defendant, Gesner, and each of the defendants, objected to the witness being recalled at that time, after the defendants had rested their case and the government had entered upon the presentation of its case, as compelling the defendant to testify against himself, compelling him to be called as a witness without his consent and over his objection. But the objection was overruled, to which each of said defendants then

and there excepted, and their exception was allowed.

Whereupon said defendant Gesner was again placed upon the stand and asked the following question:

Q. "Doctor, in Prineville, between the 15th of June, 1902, and the 25th day of June, 1902, did you have a conversation with Lawrence T. Perry, in that conversation, did you ask him to sign a school land application and an assignment of the same to the firm of Williamson & Gesner or Williamson, Wakefield & Gesner, and state to him that the land was up in Horse Heaven country; and did he ask you how much there would be in it for him, and did you answer $50; and did he then say, if he took up any school land, he would keep the land for his own use, and walked off, and did you say, as he was walking off, that it would be no trouble, 'All you would have to do would be to go to the office and sign a paper,' or words to that effect?"

Thereupon said defendant, Gesner, and each of the defendants objected to the question on the same ground as to the recalling of the witness, and upon the further ground that the matter is immaterial, irrelevant, and no proper foundation for impeachment, and is not in any way inconsistent with anything the witness has testified to upon his direct examination, and therefore not a proper subject for impeachment. But the objection was overruled, and to said ruling each of the defendants excepted, and the witness answered:

"I will say I never had any such conversation with Mr. Perry as that, none whatever at any time, June, July or any time.

Whereupon Mr. Heney said, "That's all;" and the witness left the stand. Record pages 1309-1311

And thereupon after the witness had left the stand, Mr. Heney again asked the witness to take the stand in relation to another matter.

Whereupon there was the same objection to the recalling of the witness as before; same ruling and exception.

And thereupon the witness was again recalled, over his objection and asked the following question:

"On or about June 24, 1902, in Prineville, did you ask Mary W. Swearingen to file upon 320 acres of school land in section 16, township 16-19, in the Horse Heaven country and tell her that you would give her $50 if she would make the application and an assignment to Williamson & Gesner, or Williamson, Wakefield & Gesner, or words to that effect? Or, did you tell her you would give her $25 for filing upon 160 acres, at the same time and place?

Whereupon said defendant, and each of the defendants objected upon the same ground as in the Perry matter hereinbefore referred to, and upon the further ground that it was not proper rebuttal, immaterial, irrelevant, and an attempt to prejudice the defendant by bringing in other matters having no relation to the matters charged in the indictment. But the objection was overruled and to the ruling each of the defendants excepted; thereupon the witness answered:

"Why, I think she filed on a piece of land up there, but there was no contract to sell it to me. She was keeping boarders there, and there was a vacant place, and I told her she could make something out of that land by filing on it, and if she wanted to file on it, I would let her have the money, and I did let her have the money, I think, and she filed on the land, and I bought the land of her. But I had no contract with her before to buy, no specified sum or anything else."

Q. When did you buy the land from her, Doctor?

Mr. Bennett: I want our objection and exception to all this your Honor.

The Court: I understand it applies to all this testimony?

Q. You say you bought the land from her afterwards?

A. I think so; yes.

Q. How long afterwards?

A. I don't know; I don't remember.

Q. What did you pay her for it?

A. I don't remember what I gave her now.

Q. You put up the $200 to pay for the land to the state at the time?

A. Yes.

Q. Who did you turn that over to? J. J. Smith, county clerk?

A. I don't know whether I turned it over to him or let her have the money.

Q. Did you suggest to her that she buy it?

A. I might have spoken to her about it.

Q. You don't know when you got the deed?

A. No, I don't.

Q. And didn't you get it at the time she signed the application?

A. No, sir.

Q. When do you think you got it?

A. I could not say.

Q. Haven't you any idea?

A. No. I haven't, now

Q. Did you put it on record?

A. I think it is on record.

Q. When did you put it on record?

A. I could not say for that, either.

Mr. Bennett: It is understood our objection goes to all this, as to each of the defendants separately?

The Court: Yes.

Record Pages 1311-1313

The rule that, ordinarily and generally, evidence tending to show the difendant guilty of some other crime than the one on trial, will not be admitted is too well settled to admit of successful question.

The cases where evidence of other crimes have been admitted are exceptions. They are generally cases of passing counterfeit money, false pretenses, receiving stolen goods, etc., where the difficulty of proving the crime by any other means has led the Courts to a recognition of exceptions to the rule.

Another class of exceptions grow out of cases where the two crimes are so closely connected with each other as to make it impractical to fully prove the one without disclosing the other, or where both are a part of the same immediate transaction. But these are the exceptions and not the rule, and the Courts, properly, restrict them to very narrow limits.

Boyd 20 N.Y. 142 N.Y. 456

People vs. Sharp, 107 N. Y., 427.
People vs. Molineaux (N. Y.) 61 N. E. 286.
Comm vs. Jackson, 132 Mass. 16.
Shaffer vs. Comm, 72 Pa. St. 65.
Unsell vs. State, 39 Tex. 330, 45 S. W. 1022.
Walker's Case, 1st Leigh (Va.) 574.
State vs. Godfreson, 24 Wash. 398, 65 Pac. 523.
Schazer vs. State 36 Wis., 429.

People vs. Tucker, 104 Cal. 440; 38 Pac. 195.
McGee vs. State (Miss) 22 So. 890.
State vs. Spray, Mo. 74, S. W. 846.
Leonard vs. State, 60 N. J. Law. 8; 41 At. 561.
Cobble vs. State, 31 Ohio St. 100.
Ivan vs. Comm, 104, Pa. St. 218.
Long vs. State, Tex. 47, S. W. 363.
State vs. Raymond, 53 N. J. L. 260.
People vs. Fitzgerald, 156 N. J. 253; 50 N. E. 846.
State vs. Graham, 121 N. C. 623; 28 S. E. 409.
People vs. Bowen, 49 Cal. 654.
State vs. Walters, 45 Iowa, 389.
State vs. Stevens, 56 Kans. 720; 44 Pac. 992.
McAllister vs. State, 112 Wis. 496; 88 N. W. 212.
Barton vs. Briley (Wis.) 96 N. W. 815.
People vs. Elliot, 119 Cal. 593, 51 Pac. 955.
Bomer vs. Rosser, 123 Ala. 641; 26 So. 510.
White vs. B & F. G. Co., 65 Ark. 278; 45 S. W. 1060.
Jordan vs. Osgood, 109 Mass. 457.
People vs. Schuman, 80 N. Y. 373.
State vs. Bakren, 14 Wash, 403.
Coleman vs. People, 55 N. Y. 81.
People vs. Hurley, 126 Cal, 351; 58 Pac. 814.
State vs. Fichelle (Minn.) 92 N. W. 527.
Dave vs. State, 37 Ark. 261.
Enderly vs. State, 39 Ark. 278.
Shears vs. State, 147 Ind. 51; 46 N. E. 331.
State vs. Machernagel (Iowa) 91 N. W. 761.
State vs. Bates, 46 La. An. 849; S. C. 15 So. 204.
Pike vs. Crehon, 40 Me. 503.
People vs. Shweitzer, 23 Mich. 301.

State vs. Goetz, 34 Mo. 85.
State vs. Reaves, 71 Mo. 421.
Davis vs. State, 54 Neb. 177.
Chency vs. State, 7 Ohio 222.
Barton vs. State, 18 Ohio 221.
Galbraith vs. State, 41 Tex. 567.

The effort a late text writer (Wigmore) to reverse this proposition and make the exception stand for the rule and vice versa and to make it appear that upon one pretense or another, evidence of other crimes of the same general nature are nearly always admissible, can not prevail unless the Courts are ready to disregard the holding of learned judges representing the judicial experience of years, to accept the mere *theory* of a man who does not appear to have ever participated in the actual trial of a case either on the bench or at the bar, in his life.

We submit that this learned author's book is at least as remarkable for its iconoclastic tendencies, and for the freedom with which it runs amuck upon established principles and judicial holdings, and criticizes and overrules the decisions of the ablest courts and judges, including the Supreme Court of the United States, as it is for the evident industry and energy of the author.

We submit to the court that the rule, which requires the defendant in a criminal case to be tried solely upon the crime charged, is a good one and ought not to be frittered away upon any pretext.

We have always claimed that the protection of the innocent was quite as important in our courts as the conviction of the guilty—a principle that public clamor sometimes forgets, but which we trust our Courts to constantly assert.

We submit to the Court that nothing can be more dangerous

to an innocent man on trial than to have every act of a similar nature with which he may be justly or unjustly charged, paraded before the jury.

Even if he is guilty of the collateral crimes, he may still be perfectly innocent of the one for which he is actually on trial, and if he is innocent of the collateral offenses sought to be proved against him, he is in a majority of cases practically helpless. He has come prepared to meet the main charge as best he may, but how shall he prepare to meet two or three or any number of other charges of which he may be entirely innocent, and of which he has had no notice whatever. And yet he is compelled either to attempt to meet them and try each one of them out, as if it was the main fact, or else he must stand before the jury under the imputation of being an all round rascal, who was in the habit of committing such acts and was therefore likely to have committed the one on trial. It is no protection to have the Court learnedly charge the jury that they must only consider such evidence for certain purposes. They can not do this even if they each and all fully understand the charge (which is little likely) and honestly make the attempt. It is a human impossibility. The judge himself can not perform this mental feat, with all his judicial temperament and training. How much less the untrained mind of the average juror not accustomed to analyze or differentiate closely, but used to general reasoning and more or less general conclusions.

Even if he is more or less guilty of the other offenses charged, the defendant is not placed in a fair light before the jury.

His bad acts are selected out and arrayed before the jury. He has no right upon the other hand to meet them with proof of other acts of virtue and well-doing, and if he had the right it

would be impractical. The jury have before them, then, a man whose life from the samples presented to them, has been one of wrong and crime. And yet he may have been upon the whole, a fairly good man. Few are the specimens of poor humanity who could stand the test of having their good acts stripped away, and being judged entirely by the wrongs they may have committed and the bad they may have done.

There is no excuse for a rule which would permit this except that of actual necessity. It is impossible to prove the essential elements of a particular crime (as a rule) in any other way, then it may perhaps be justified, notwithstanding the danger to the innocent.

But the exceptions to the general rule, ought to be narrowed within the narrowest limits—not extended—and the rule ought not to be brushed away upon the theory that the evidence bears in some remote conjectural and fanciful way upon the question of motive or intent. Such an exception would wipe away the rule entirely, for motive and intent are always in issue in a criminal case.

That this is not the true state of the authorities is obvious from an examination of the long line of authorities cited supra.

In Commonwealth vs. Jackson, 132 Mass. 16, the defendant was indicted for his false representations as to the kindness and soundness of a horse. Evidence was offered and admitted that about the same time (within less than two months) the defendant had made practically the same representations in the separate sale of three other horses at different times, all of which was false. The evidence was admitted for the purpose of showing intent only and was carefully limited to that purpose. Judge Devens, delivering the opinion of the Court, says:

"The objections to the admission of evidence as to other

transactions, whether amounting to indictable crimes or not, are very apparent. Such evidence compels the defendant to meet charges of which the indictment gives him no information, confuses him in his defense, raises a variety of issues, and thus diverts the attention of the jury from the one immediately before it; and, by showing the defendant to have been a knave on other occasions, creates a prejudice which may cause injustice to be done him. It is a well-settled rule of the criminal law, that the general character of a defendant cannot be shown to be bad, unless he shall first himself attempt to prove it otherwise. It ought not to be assailed indirectly by proof of misconduct in other transactions, even of a similar description.

So in the case of People vs. Molineaux, 61 N. E. 286, it is said by Werner, judge, delivering the opinion of the court:

"The general rule of evidence applicable to criminal trials is that the state cannot prove against a defendant any crime not alleged in the indictment, either as a foundation for a separate punishment, or as aiding the proofs that he is guilty of the crime charged."

And O'Brien, judge, in a concurring opinion, says:

"It is said that the evidence culminating in Barnett's death tends to identify the defendant as the author of the death of Mrs. Adams; but that is only another way of asserting the general proposition that the commission by the defendant of one crime tends to prove that he committed another crime, and, no matter in what form or how often that proposition is asserted, or how persuasive and plausible it may appear, it is erroneous and misleading, since it violates a salutary principle of the law of evidence, which should be applied in all cases without regard to the question of actual guilt or innocence. If the guilty cannot be convicted without breaking down the barriers which the

law has erected for the protection of every person accused of crime, it is better that they should escape, rather than that the life or liberty of an innocent person should be imperiled. I think the evidence relating to Barnett's sickness and death would not for a moment be considered competent but for the fact that it creates a strong impression upon the mind that the author of his death must be the author of Mrs. Adams' death, since in both cases death was caused by similar means. We may attempt to deceive ourselves with words and phrases by arguing that it is admissible to prove intent, or identity, or the absence of mistake, or something else, in order to bring the case within some exception to the general rule; but what is in the mind all the time is the thought ,so difficult to suppress, that the vicious and criminal agency that caused the death of Barnet also caused the death of Mrs. Adams. The rule of law that excludes the evidence for such a purpose may be, and probably is, contrary to the tendency of the human mind; but, since the law was intended to curb the speculations of the mind, and to guard the accused from the result of error in its operation, I am for maintaining the law in all its integrity and not for undermining it by qualifications that rest upon no reasonable or logical bisis."

In the case of Paulson vs. State, a Wisconsin case, in 94 N. W. 771, the charge was murder *for the purpose of robbery*, and evidence of a previous *larceny* had been admitted ostensibly because defendant had explained his possession of money after the murder by claiming that he obtained it in the previous larceny. The Court says:

"From the time when advancing civilization began to recognize that the purpose and end of a criminal trial is as much to discharge the innocent accused as to punish the guilty, it has been held that evidence against him should be confined to the

very offense charged, and that neither bad character nor commission of other specific disconnected acts, whether criminal or merely meretricious, could be proved against him. This was predicated on the fundamental principle of justice that the bad man no more than the good ought to be convicted of a crime not committed by him. An exception is indulged in where other crimes are so *connected with the one charged* that their commission directly tends to prove some element of the latter—usually guilty knowledge, or some intent. We mention this exception merely for accuracy, to qualify the generality of the foregoing statement. It obviously can have no application to such remote and disconnected events as those here presented. The cases in which overzealous prosecutors have trespassed this rule, so that appellate courts have had occasion to give it reiteration, are almost without number."

Here follows citations to a large number of cases.

"The foregoing cases are referred to not so much to establish the rule that evidence of such remote acts is irrelevant, and therefore inadmissible, for that must be obvious at a glance. That one stole rye from some one in Minnesota in 1895 has no tendency to prove that he committed this murder in Wisconsin in 1898. They are cited more especially to *show how uniformly Courts have held that one cannot be deemed to have had fairly tried before a jury the question of his guilt of the offense charged when their minds have been prejudiced by proof of bad character of accused, or former misconduct, and thus diverted and perverted from a deliberate and impartial consideration of the question whether the real evidentiary facts fasten guilt upon him beyond reasonable doubt.* In a doubtful case even the trained judicial mind can hardly exclude the fact of previous bad character or criminal tendency, and prevent its having effect to swerve such

mind toward accepting conclusion of guilt. Much less can it be expected that jurors can escape such effect."

In the case of Boyd vs. United States, 142 U. S. 450, the defendants Boyd and Stanley were on trial jointly for the murder of one Dansby, claimed to have been committed in *an attempt to rob*. The tendency of the proof offered by the government was to show that the killing occurred in an altercation between the defendants and a man by the name of Davis (killed in the row) on the one side and Dansby, Butler and Joseph and Martin Byrd on the other, that the defendants and Davis were attempting to rob Martin Byrd, Davis presenting a pistol and demanding his money and that in the altercation which followed Davis and Dansby were killed.

The theory of the defendants on the contrary as outlined by their counsel, was that while they and Davis were at a ferry landing attempting to get across, they were attacked by the Dansby Byrd crowd, who were attempting to arrest them for previous robberies and that in the altercation which ensued, the Byrd crowd fired upon them and killed Davis and that their shooting was in self-defense of the assault.

The killing occurred on April 6th and the prosecution was permitted to prove that on the night of the preceding March 15th the defendant Stanley had robbed Brinson and Mode, and that on the 17th of March he and Boyd had robbed one Hall, that on the night of March 25th defendants Stanley and Davis robbed one John Taylor and that on the evening before the killing, the three, Davis, Boyd and Stanley, robbed Rigsby's store.

The evidence was admitted for the purpose of proving the identity of the defendants and especially of the defendant Stanley, and also for the purpose of showing that if the killing occurred in the course of an attempt to arrest as claimed by the

defendants, that the arrest was justified by the previous robberies.

The case was reversed, Chief Justice Harlan saying:

"No notice was given by the indictment of the purpose of the government to introduce proof of them. They afforded no legal presumption or inference as to the particular crime charged. Those robberies may have been committed by the defendants in March, and yet they may have been innocent of the murder of Dansby in April. *Proof of them only tended to prejudice the defendants with the jurors, to draw their minds away from the real issue*, and to produce the impression that they were wretches whose lives were of no value to the community, and who were not entitled to the full benefit of the rules prescribed by law for the trial of human beings charged with crime involving the punishment of death. Upon a careful scrutiny of the records, we are constrained to hold that, in at least the particulars to which we have adverted, those rules were not observed at the trial below. However depraved in character and however full of crime their past lives may have been, the defendants were entitled to be tried upon competent evidnce, and only for the offense charged.

Perhaps there is no more instructive or clearer discussion and statement of the rule than the concurring opinion of Judge Peckham, now Justice of the United States Supreme Court, in the case of People vs. Sharp, 107 N. Y. 427; 14 N. E. 345. In this case the defendant was indicted for bribing a member of the Common Council of the City of New York with $20,000 to influence him in a matter of a franchise of the Broadway Railroad Company. Proof was admitted by the lower court tending to show that he had the previous year offered the engrossing clerk of the Assembly $5000 to alter a bill so as to give the railroad a franchise. It was held that the evidence was improperly ad-

mitted. Judge Peckham says:

"Under such conditions, and guided by such rules, it does not seem to me that this evidence by Pottle was so connected legitimately with the main transaction—that of the alleged bribery of Fullgraff—as in any way to characterize the intent with which the money was alleged to have been paid Fullgraff, in any other sense than the evidence tends to show capacity upon the part of the prisoner to commit the crime because he had, months before, attempted to commit one of a similar nature, with another person, for the purpose of accomplishing another act. *It is a very general, and extremely broad, and, I think, a dangerous, ground upon which to claim the admissibility of evidence of this character, to say that it tends to show that the prisoner was desirous of obtaining a railroad on Broadway that he was willing to commit a crime for the purpose of securing his object.* It seems to me this is nothing more than an attempt to show that the prisoner was capable of committing the crime alleged in the indictment becapse he had been willing to commit a similar crime along before, at another place, and for the purpose of accomplishing the commission of another act by a different person. *To adopt so broad a ground for the purpose of letting in evidence of the commission of another crime is, I think, of a very dangerous tendency.*. It tends necessarily and directly to load the prisoner down with separate and distinct charges of past crime, which it cannot be supposed he is or will be in proper condition to meet or explain, and which necessarily tends to very gravely prejudice him in the minds of the jury upon the question of his guilt or innocence. I do not think that evidence of the kind in question, and in such a case as is here presented, legitimately tends to enlighten a jury upon the subject of the intent with which money was paid many months thereafter to another person, at a differ-

ent place, and to accomplish the commission of another act. *It throws light upon that intent only, as it tends to show a moral capacity to commit a crime.. It gives, under the circumstances, entirely too wide an opportunity for the conviction of an accused person by prejudice, instead of by evidence showing the actual commission of the crime for which the defendant is on trial.*"

It is true that this decision is criticized and disapproved by Mr. Wigmore with his usual comfortable assurance. But we submit that it is entirely supported by the long list of authorities cited *supra* and is besides in line with the principles of common sense and enlightened justice and that the opinion of this eminent and experienced jurist will be a part of the law on this subject, when the theoretic book of the learned author will be dusty and musty with age and disuse.

It will be seen that the offenses against the State of Oregon and the offense sought to be proven were entirely independent transactions and these collateral offenses were only similar in the general nature of the offenses—that is, each related to the crime of perjury in the application for land—in all other respects they were entirely distinct.

The crime charged was that of a *conspiracy* to suborn perjury, in the matter of an application for *timber lands* of the Unit-

ed States. This conspiracy was alleged to be between *all three* of the defendants and the "conspiracy" was the sumstantive element of the offense and the perjury was charged to have been contemplated before Biggs, who was a United States Commissioner and alleged to be one of the conspirators.

The collateral crimes offered in evidence involved one, or at the most, two, of the defendants only. It was not even claimed that Biggs had anything to do with them, nor were they offered against him, so that it is entirely plain that the collateral crimes (admitting that they were committed) were an infraction of a different law against a different sovereignty involving the perjury of altogether different individuals from those charged in the indictment and in relation to different lands, before different officers, and involving an entirely different proposition, in which it was only claimed that a portion of the defendants shared.

It can hardly be claimed that this evidence was competent for the purpose of showing plan or design, because the transactions involved, as we have seen, different parties, different lands, a breach of different laws and an offense against different governments and would be too remote for this purpose under any of the authorities.

So it is difficult to conceive how it can be contended that it was proper for showing motive or intent. The only thing that could possibly be material for the purpose of showing motive would be the mere fact that some of the defendants owned other

land in that vicinity, and therefore, might wish to acquire the lands in question; but this is very remote and insufficient to justify the introduction of such testimony.

People vs. Sharp, 107 N. Y., Supra.

Besides, if this had been the purpose it would only have been necessary to have shown the facts as to the ownership of the land, the deed from the state, etc., and it would have been entirely unnecessary to have gone into all the details as to the alleged subornation of perjury in the state land matters.

Even when evidence of another offense is admissible the prosecution cannot be permitted to go into unnecessary details.

Martin vs. Commonwealth, 93 Ky. 189, 19 S. W. N. 580.

So the evidence was entirely too remote under the authorities for the purpose of showing intent, even if the intent did not speak for itself in this case. It would be very far fetched reasoning indeed, to say that, because a party had committed subormation of perjury by inducing one person to swear falsely in relation to one piece of land in a proceeding with one sovereignty, that therefore he intended to induce a different person to swear falsely in relation to a different piece of land before a different tribunal and in relation to the rights of a different sovereignty.

The act in the one case would only tend to prove the criminal intent in the other case, on the theory that the defendant, being a bad man, likely to commit crime and having a vicious intent in the one case, was likely to have a like vicious intent in the other case. And this would be simply saying that you could prove the one offense by showing that the defendant was a bad

man and therefore likely to commit the other. Opinion of O'Brien, judge, in People vs. Molineaux, and Peckham, judge, in People vs. Sharp, Supra.

Besides, the acts charged in this indictment, if proven, spoke for themselves and needed no other evidence of intent. The charge was that the defendants had themselves made contracts (or were to have made them) with these applicants to transfer the land to them and then were to induce the applicants to swear that they *had made no such contract.*

If this was true, there was no room for any question about the intent. If these applicants had made contracts with *these defendants* and these defendants induced them to swear that they had not made any such contract, it is perfectly plain that the intent to have them swear falsely existed as a matter of necessity.

It was one of those cases where the act spoke for itself. We submit therefore that the only sogency of this proof, as stated by Judge O'Brien in the Molineaux case, was to show that the defendants were bad men who had committed other offenses of the same character and were therefore likely to have committed this crime. It is said that such proof is admitted in France and perhaps in some other countries, but, however plausible it may seem to theorists, we submit that it has never yet been admitted in any court in this country, and we submit further, that while such a rule might tend in many instances to insure the conviction of the guilty, it would also involve the innocent in griveous danger—such danger as would far overbalance any good that might come from the rule.

We submit, therefore, that this testimony was incompetent and inadmissible for any purpose or at any time.

NOT PROPER REBUTTAL.

But the manner in which this evidence was introduced made it still more inadmissible—still more dangerous.

If such testimony was admissible it was plainly a part of the prosecution's *direct case* and was not admissible in rebuttal. Then the defendants would have had more time and better opportunity to have met and disproved, justified, excused or explained these alleged collateral offenses, but it was held back and only disclosed to the defendants in the rebuttal case at the end of a long and tedious trial and but a few hours before the case was submitted to the jury.

We submit, therefore, that this accentuates the error in admitting the evidence at all, and makes the prejudice to the defendants essentially greater even, than it otherwise would have been.

NOT PROPER CROSS-EXAMINATION OF DEFENDANTS.

In order to lay an apparent foundation for the introduction of this testimony in rebuttal the defendant Gesner was recalled and compelled to testify in relation to these matters *in cross-examination*, after the defendants had rested their case and the government had entered upon its rebuttal.

Gesner had not testified at all in relation to these collateral matters on his direct examination, and, indeed, had not been asked at all about them up to the time he was compelled to take the stand for such re-cross-examination. We submit that this was not proper cross-examination. That cross-examination should be

confined to matters brought out in the direct and that a defendant on the witness stand can not be cross-examined as to collateral matters about which he has not testified at all in his direct.

It is true that in some cases the Court has a certain discretion in permitting a cros sexamination to extend beyond the fair purview of the direct.

Since it is ordinarily the mere matter order of proof.

Santy vs. U. S., 117 Fed. 132.

But in a criminal case where the defendant himself is on the stand the rule is different he only subjects himself to a fair cross-examination and anything more than that is prejudical and reversible error.

People vs. McGungill, 41 Cal. 431.

People vs. Rodriquez (Cal.) 66 Pac. 174.

Error in refusing to charge as follows:

'EVEN IF YOU SHOULD FIND THAT SOME ONE OF THE DEFENDANTS INTENDED TO SUBORN PERJURY, OR EVEN DID SO, THIS WOULD NOT JUSTIFY A CONVICTION OF THE CHARGE IN THIS INDICTMENT UNLESS YOU FURTHER FIND THAT TWO OR MORE OF THESE DEFENDANTS DEFINITELY PLANNED AND AGREED AMONG THEMSELVES TO PROCURE THE ALLEGED PERJURY."

There was evidence in this case which was admitted against Gesner alone, as for example, letters written by him (see record pages 485), and evidence of numerous witnesses like that of Ben Jones (see record page 163), which in its direct effect at least involved only one defendant. For illustration of testimoney of such other witnesses see pages 1322-1323-1825 of the record.

Hence the propriety of the above request in order that the jury should not get confused as to the issue and find a verdict of guilty against all, if they thought that some one of the defendants intnded the subornation of perjury, and that the others were involved in a plan to secure land without having agreed with any one that perjury should be suborned.

A definite *agreement* of some kind, either tacit or expressed between the conspirators, is the very essence of this crime.

U. S. Martin, 4 Clifford 163.

Pettibone vs. U. S., 148 U. S. 197.

4 *Elliot on Ev.,* Sec. 2926.

It is true that this agreement need not be a formal one or expressed in words, and the jury may infer it from circumstances,

but in *some form* the agreement and preconcerted action must exist. Here the defendants were strenuously contending that there was no such agreement in any way or form, and while there was evidence no doubt from which a jury might infer such agreement, yet the defendants were surely entitled to have them fully informed in language which they could not misunderstand, that some kind of a definite agreement between the parties was the essence of this offense. The offense is a peculiar one—it is the preconcerted agreement, not the act, and joint action without the agreement will not make the offense.

Clifford vs. Brandon, 2 Champbell 358.
Newall vs. Jenkins, 26 Pa. St. 160.
Rex. vs. Pywell, 1 Starkie 402; 2 E. C. L. 156.

An error of a somewhat similar nature was committed in refusing the following instruction:

"EVEN IF YOU FIND THAT PERJURY WAS COMMITTED BY SOME ONE OR MORE OF THE APPLICANTS IN QUESTION THAT WOULD NOT JUSTIFY A VERDICT OF GUILTY, UNLESS YOU FURTHER FIND THAT AT LEAST TWO OF THE DEFENDANTS CONSPIRED AND AGREED TOGETHER TO PROCURE THE PERJURY TO BE COMMITTED.

Referring again to the testimony of Ben Jones, one might believe that he committed perjury, and that neither Williamson or Biggs ever conspired to suborn perjury, or that they had any idea that perjury would be committed.

And the jury might have believed from the evidence that even if Gesner knew that Jones would commit perjury that he was not in a conspiracy with any one to suborn perjury.

It is manifest that this is a case where there was a great

probability that the jury might be confusel as to the real issue and convict upon collateral matters.

There was error in refusing to charge the jury as follows:

"THE DEFENDANTS ARE NOT CHARGED WITH DEFRAUDING OR ATTEMPTING TO DEFRAUD THE GOVERNMENT, AND THEREFORE ANY MERE ATTEMPT TO EVADE THE LAW ON THEIR PART (IF THERE WAS ANY SUCH ATTEMPT) WOULD NOT JUSTIFY A VERDICT OF GUILTY UNLESS THERE WAS ACTUALLY AN AGREEMENT AND CONSPIRACY AMONG THEMSELVES TO PROCURE PERJURY."

It is to be born in mind here that under the charge in the indictment the object of the conspiracy was to suborn perjury, not to acquire title to a portion of the government domain by fraudulent entries.

The natural ultimate object of a conspiracy involving matters of this kind would be to acquire land, and the testimony of all the applicants tended in this direction rather than to show that the ultimate object was a conspiracy to suborn perjury.

(See 328-288, 353-381, 389-416, 1141-1244, 1516-, 1362, 1468-, 162-, 1889-, 293-, 551- of the record containing the testimony of nineteen persons mentioned in the overt acts charged in the indictment, page 14-21 of the record.)

It is manifest that no general statement of the law would be sufficient to warn the jury and hold them to the issue. It was necessary that they should be told directly and positively that a mere attempt to evade the law did not constitute the offense charged.

There was error in refusing the request to charge as follows:

"THE CHARGE IN THIS INDICTMENT IS THAT THE OATHS OF THE APPLICANTS IN QUESTION WERE INTENDED TO BE FALSE IN THE MATTER OF THE ALLEGED CONTRACT TO CONVEY TO VAN GESNER AND WILLIAMSON, AND YOU MUST BASE YOUR FINDINGS ON THAT CHARGE ALONE."

The refusal to charge as above requested merits a comment of a like nature as those above.

There was error in refusing to charge as follows:

"EVEN IF YOU SHOULD BELIEVE, THEREFORE, THAT THE APPLICANTS, OR SOME OF THEM, WERE INACCURATE OR TESTIFIED FALSELY AS TO WHERE OR HOW THEY OBTAINED THE MONEY TO PROVE UP ON THEIR CLAIMS THAT ALONE WOULD NOT BE SUFFICIENT TO SUSTAIN A VERDICT OF GUILTY IN THIS CASE."

It will be remembered that the government was permitted to offer evidence tending to show that the lands were not subject to entry; that there was no timber upon the different claims. The government was also allowed to offer evidence tending to show that the money with which to prove up wasobtained by some of the applicants in a different manner from that which wa testified by them.

(See page — —of the record.)

Hence the propriety of the above request.

THE INDICTMENT DOES NOT CHARGE THAT EITHER DEFENDANT WILLIAMSON OR GESNER DID ANY OVERT ACT; HENCE THE COURT COMMITTED MANIFEST ERROR IN CHARGING THE JURY AS FOLLOWS:

"The offense is sufficiently proved if the jury is satisfied from the evidence, beyond a reasonable doubt, that two or more of the parties charged, in any manner or through any contrivance positively or tactitly came to a mutual understanding to accomplish a common and unlawful design, followed by some act done by *any one of the parties* for the purpose of carrying it into execution."

To warrant a conviction it must appear (1) that a conspiracy existed as charged in the indictment, (2) that if such conspiracy existed the *overt act charged* was committed in furtherance of such conspiracy, and (3) that the defendant was one of the conspirators.

United States vs. Cassidy, 67 Fed. Rep. 698.

United States vs. Newton, 52 Fed. Rep. 275.

United Statse vs. Goldberg, 7 Bliss (U. S.) 175.

It is a question for the jury to determine whether any one of the acts, alleged to have been done to effect the object of the conspiracy, was actually committed, and if so whether it was done to effect the object of the conspiracy. See

United States vs. Sanche, 7 Fed. 715.

The instruction complained of was not modified by other instructions given, but to the contrary, it was several times stated

to the jury i effect that in so far as the overt act was concerned it was sufficient if any one of the defendants did anything to effect the object of the conspiracy.

Apart from any authority, it is manifest that the government must prove its case as alleged in the indictment, and that there could be no proper conviction of any of the defendants upon proof of the conspiracy charged and proof of an overt act other than one alleged in the indictment, whether such overt act was committed by a person alleged to have committed some overt act or by a defendant who was not alleged to have committed an overt act. The indictment charges that the defendant Biggs committed several overt acts, but it charges no overt act against any other defendant. The jury might have based a conviction upon an overt act done by the defendant Williamson, or by an overt act done by the defendant Gesner. They might have thought that Gesner did an act to effect the object of the conspiracy.

They might have believed the evidence of Ben Jones when he testified that (see page 168 of the record) Gesner asked him and wife to take up a claim, and that this was an act done t effect the object of the conspiracy.

The jury might have believed the evidence of each applicant who talked with Gesner and found from such evidence that Gesner committed a number of overt acts.

See pages 162 of the record.

The jury might have believed the testimony of John Watkins when he testified, see page 296 of record, that Williamson wrote the description of the land to be entered in a book and that such act was in furtherance of the conspiracy.

In fact there is just as much reason to believe that the jur based their verdict on an overt act committed by Williamson or

by Gesner as that they based a verdict upon an overt act alleged in the indictment. The chances are at least two to one against the jury's basing its verdict upon an overt act alleged. There was considerable evidence to the effect that Biggs told the applicants that they could properly take the oath required of them when they were applying to enter the land. We submit that these plaintiffs in error are entitled to a trial of their case according to the rules of law, and that the instruction complained of is a plain violation of their legal right.

ERROR IN PERMITTING THE INTRODUCTION OF EVIDENCE TENDING TO IMPEACH THE WITNESS BRANTON BY SHOWING CONTRADICTING STATEMENTS AS TO COLLATERAL AND IMMATERIAL MATTERS.

This witness was a very important witness for the defendants. He was the only one of all the witnesses who talked with Gesner about taking land, who had not himself applied. He was not under fear of indictment himself. The government could not claim that he had been guilty of perjury in the matter, for he had made no application at all. All the witness agreed that he was present and his testimony entirely corroborated Gesner.

The prosecution was permitted to impeach him by showing alleged contradictory statements as to an entirely immaterial matter about which he had not testified at all in his direct.

It was made to appear in cross-examination that a day or two before the talk with Gesner, he was traveling through the county and stopped at the place of one Adams. Being asked by the prosecuting attorney where he was going, he said he was on his way to Vale, which is in the extreme eastern part of the State of Oregon and not a great distance from the Idaho line.

The prosecution was then permitted to ask him if he had not stated that he was going to Idaho and he, having denied making such a statement, to impeach him by calling two witnesses to contradict him by showing that he had.

The only foundation laid for the impeachment of this witness in this matter was as follows.

"Q. I thought you were on your way to Idaho, wasn't you?

A. When I met Campbell Duncan?

Q. Yes.

A. No, sir, I was not.

Q. Did you say you were?

A. I did not.

Q. Didn't you tell him that?

A. I did not.

Q. Didn't tell anybody that?

A. I did not.

Q. How did you come to go to Campbell Duncan's house?

A. I was on my way to Vale, Ore., in the eastern part of the state. I had a younger brother there by the name of Fred, and he wanted me to come out to where he was located, and I stated at the time, I thought I would go up there, and I came along where Campbell was living."

Record page 1100

The impeachment by Adams was as follows:

"Thereafter, one William Adams was called as a witness, and after testifying that he had a ranch near Prineville, where Campbell Duncan was working, and that the witness Branton came along there in June, 1902, was asked the following question:

"Well, did he state to you that he was going to Idaho at that time?"

To which defendants objected as incompetent and not proper impeaching question, and no proper foundation laid for it, but the objection was overruled and the defendants excepted, whereupon the witness answered:

"Yes, sir."

Thereupon the following questions were asked:

Q. At the time of the conversation, I refer, was this man Branton there at your place?

A. Yes, sir.

Q. How long was he there?

A. Three nights and days.

Q. I a mtalking about the time he camped there. Did he then state to you that he was going to Idaho?

To which question the defendant objected as not a proper impeaching question and no proper foundation laid for it and incompetent, but the objection was overruled and the defendants excepted.

Whereupon the witness answered:

Yes, sir.

Q. Was Duncan present when he said this? Was Cam Duncan present when Branton said it to you?

A. Yes, sir.

Record page 208

The impeachment by Duncan was as follows:

"Thereafter on rebuttal one Campbell Duncan was called as a witness by the government and asked the following question:

Q. Mr. Duncan, when you first saw Clarence Branton—the witness hereinbefore referred to—there (at Adams' ranch) what did he tell you, if anything, as to where he was going?

Objected to by the defendant as not proper rebuttal.

Objection overruled and defendant excepted. Witness answered:

He said he was going to Idaho, on his road there."

Record page ——

It is well settled that it is error to permit the impeachment of

a witness on such collateral and immaterial matters—if a witness is asked in relation to such matters upon cross-examination his answer is conclusive.

Rapalje on Witnesses, Page 345, sec. 209.

People vs. Kellat, 53 Cal. 65.

Everett vs. Pierce, 59 Cal. 540.

The prosecution also sought to impeach this witness by supposedly contradictory statements made to one Ray in relation to the reason he did not take up a timber claim.

The foundation for this was as follows:

"Q. About one year after you had been up to the timber and in Prineville, didn't you have a conversation with Frank Ray, and didn't you tell him that the reason you did not take a timber claim at that time was because there wasn't enough in it?

A. I don't remember having any conversation with Frank Ray at all regarding the timber.

Q. You will swear you did not say that to him?

A. I am positive that I never met Frank Ray to my knowledge except once from the time that we were up there in the timber until since I came here to Portland at this trial.

Q. When was that once?

A. I met him on the road east and north of Prineville. I don't remember the name of the stream he was on, but I was going to look after some horses I had, and I met Frank Ray, if I remember right, and I might possibly mistaken in meeting him there; it might have been in May or June, 1903.

Q. Did you tell him on that occasion at that place that the

reason you did not take a timber claim, referring to the time you went up there, when Dr. Gesner was there, was because there wasn't enough in it for you?

A. No, sir; I did not.

Q. Or that in substance?

A. No, sir."

1100-1101

Record page ——

"And thereafter, one Frank Ray was called as a witness, and having testified that he met the witness Branton on the road east and north of Prineville, in May or June, 1903, was asked the following question:

And on that occasion, did he say to you that the reason he did not take up a timber claim at that time that he was up there at the shearing plant was because there wasn't enough in it, or words to that effect?"

To which question the defendants objected upon the ground that there was no proper foundation for impeachment, and also that the circumstances for time, place, and persons present, were not called to the attention of the witness Branton while he was on the stand, but the objection was overruled, to which ruling defendants expected and their exception was allowed. Thereupon the witness answered:

"Yes, sir."

There was no foundation for the foregoing impeachment question, except as hereinbefore set forth, in relation to the cross-examination of the witness Branton." Record page 1252

It will be observed that the conversation was not shown to have occurred at the time referred to by Branton. Branton did not remember having any talk with him at the time he referred to. The places were not fully identified as the same. ~~The one referred to by Branton was on the road east and north of Prineville~~

and that about which Ray was asked on the road *north* from that place. There was nothing to show that they were on the same roads or that it was the same meeting and the time was but little more definitely fixed. The conversation related by Ray, if it took place at all, might have been and probably was at some other time than the one remembered by Branton. The rule which requires time, place and persons present to be pointed out definitly so as to fully inform the witness of the time referred to and to refresh his memory in relation thereto is well established.

Rapalje on Witnesses, page 338, Sec. 203, and authorities cited.

In conclusion, we submit that the Court below clearly erred.

1st. In holding that the indictment was sufficient.

2nd. In holding that the indictment charged conspiracy to suborn perjury in the matter of final proofs and in admitting testimony thereof and submitting the case to the jury on that theory.

3rd. In permitting the witnesses to state their "understanding" of the transaction with Gesner and their undisclosed intention at the time of their application and final proof.

4th. In charging the jury that the indictment might be sustained by proof of an overt act of *any* of defendants, whereas the the indictment only charges overt acts of Defendant Biggs.

5th. In refusing to instruct the jury that there must be, in some form ,a definite agrement or concert of action between the parties to make conspiracy, and that a simple intent to evade the provisions of the timber law would not sustain the indictment.

6th. In admitting evidence of distinct offenses against the state of Oregon in the matter of school lands.

7th. In permitting the witness Branton to be impeached as to collateral and immaterial matters.

There are numerous other errors of which we complain, some of which we have noticed in this brief, but these seem to us so clear and plain as to show that the defendant did not have a trial according to the rules of law. Of course, we have no right to ask this Court to pass upon their guilt or innocence, but we do have a right to ask that their trial be based upon the assumption of innocence and that all the safeguards of innocence provided by law be applied.

Respectfully submitted,

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IN THE

United States Circuit Court of Appeals

For the Ninth Circuit.

VAN GESNER,
Plaintiff in Error,
vs.
UNITED STATES OF AMERICA,
Defendant in Error.

MARION R. BIGGS,
Plaintiff in Error,
vs.
UNITED STATES OF AMERICA,
Defendant in Error.

JOHN NEWTON WILLIAMSON,
Plaintiff in Error,
vs.
UNITED STATES OF AMERICA,
Defendant in Error.

BRIEF OF DEFENDANT IN ERROR ON APPEAL.

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No. 1369

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BRIEF OF DEFENDANT IN ERROR ON APPEAL.

The appeal in the case of the *United States v. Williamson* ought to be dismissed because it appears from the admission of his attorneys, formally made

in their opening brief in the above-entitled causes, at page 2 thereof, that

"Prior to the writ of error in this case the defendant Williamson, who was a representative in Congress, had sued out a writ of error to the Supreme Court of the United States, based upon the holding of that Court in the *Burton* case, that a sentence of imprisonment against a member of Congress involved a constitutional question, giving the right of appeal direct to that Court. At the time the writ of error was sued out in this case the constitutional question in the *Burton* case had never been decided. This writ of error to this Court in the *Williamson* case was sued out after the writ to the Supreme Court, and out of abundance of caution in case the writ to the United States Supreme Court should be dismissed upon jurisdictional grounds.

"The jurisdiction of this Court, therefore, in the *Williamson* case depends upon whether the United States Supreme Court shall entertain jurisdiction thereof, and if it holds that it has jurisdiction to pass upon the merits, then the proceeding in this Court necessarily fails."

It is admitted on behalf of the defendant in error that a writ of error to the Supreme Court of the United States was sued out by the defendant Williamson, one of the plaintiffs in error herein, at a time prior to his suing out of the writ of error in the same identical case which is now before this Court;

and it is further admitted on behalf of the defendant in error that said writ of error so taken by the defendant Williamson to the Supreme Court of the United States is now still pending there on appeal.

Under the circumstances this Court has no jurisdiction to entertain the appeal in the *Williamson* case, and the same ought to be dismissed upon its own motion. A party who desires to appeal from a judgment in a criminal case direct to the Supreme Court of the United States upon the ground that his sentence involves a constitutional question must elect whether he will take his writ of error or appeal to the Supreme Court upon that constitutional question alone, or to the Circuit Court of Appeals upon the whole case.

McLish v. Roff, 141 U. S. 661.

INDICTMENT SUFFICIENT.

Plaintiffs in error demurred to the indictment upon the ground that it "is not direct and certain as "to the crime charged or the particular circum- "stances of the crime. And that it does not set "forth the name or identity of the persons the de- "fendants are charged with having conspired to "suborn, and does not describe or identify the per- "jury which is alleged to have been suborned, insti- "gated and procured, or the land as to which such "perjury was to be committed."

Additional grounds for holding the indictment insufficient were set forth in a motion in arrest of

judgment, but those grounds are unimportant and they are not the character of objections that can be urged for the first time after verdict.

The indictment is sufficient as against a general demurrer and as against the particulars just hereinbefore set forth. The offense charged is conspiracy under Section 5440, Revised Statutes of the United States, to commit an offense against the United States, to wit: the offense of subornation of perjury. If the parties to the conspiracy did not, at the time they entered into it, agree upon the identity of the persons whom they intended to suborn to commit the perjury, nor upon the identity of the particular land which they intended to suborn persons to acquire for the benefit of defendants, it requires no argument to demonstrate that it is not necessary to allege those facts in the indictment with any greater particularity than they were described or identified by the parties at the time they entered into their unlawful agreement, which constitutes the offense for which they were indicted.

In order to sustain the demurrer upon the grounds specified, it would be necessary to hold that the conspiracy would not be unlawful unless the parties specifically agreed upon the identity of the persons whom they intended to procure to acquire the lands for them, nor unless they likewise specifically agreed upon the identity of the lands which they expected to thus acquire by means of their unlawful agreement.

It is urged, however, that the indictment is not sufficient and does not state an offense because it does not allege that the persons to be suborned to commit perjury would "willfully" swear falsely; we must not lose sight of the fact that the offense charged in this indictment is conspiracy and not perjury. In this indictment the unlawful agreement is the offense and the perjury which is to be committed is merely the object of the unlawful agreement.

> "In stating the object of the conspiracy the same certainty and strictness are not required as in the indictment for the offense conspired to be committed. Certainty to a common intent sufficient to identify the offense which the defendants conspired to commit is all that is required. When the allegation in the indictment advises the defendants fairly what act is charged as a crime which was agreed to be committed, the chief purpose of pleading is obtained. Enough is then set forth to apprise the defendants so that they may make a defense. The point urged seems more refined than sound."
>
> *United States v. Stevens,* 44 Fed. Rep. 141.

The foregoing case is directly in point, and was followed by Judge Bellinger in the case of *United States v. Wilson,* 60 Fed. Rep. 891.

In the last-mentioned case Judge Bellinger said:

> "In indictments for conspiracy the offense which the defendants are accused of having conspired to commit need not be set out with the same degree of strictness that is required where the indictment is for the commission of the offense itself. All the decisions upon this point are to the effect that certainty to a common intent is all that is necessary."

And again, in the same case, Judge Bellinger says:

> "This construction may be liable to technical objection, but the strictness that answers such objection is not, as has already been shown, regarded in the description of an offense where the indictment is for a conspiracy to commit such offense."

In the case of *United States v. Eddy,* 134 Fed. Rep. 114, Judge Hunt says:

> "The steady tendency of the courts of the United States undoubtedly is to disregard forms, even though they be mistaken in expressing the substance of crimes in indictments, if the meaning can be understood, and if the bill charges the offense in such a way as clearly to inform the person of the violation of the law with which he is charged, and protect him in the event of conviction or acquittal, against a second trial for the same offense."

It may be conceded that it must appear from a fair construction of all the language of the indictment that the defendants intended that the false oaths to be made by the persons suborned should be "willfully" made by them, but it is not necessary that this element of the offense shall be charged only by the use of that particular word. It is sufficient if it is charged in equivalents. At common law in this particular, perjury was defined to be a

> "willful, false oath by one who, being lawfully required to depose the truth in any judicial proceeding, swears absolutely in a matter material to the point in question whether he believed it or not."
>
> 2 *Chit. Cr. L.,* 302.

Thus, it will be seen that the offense had to be "willful," but it was well settled at the common law that the use of that identical word in an indictment was not necessary, it being implied from the words "falsely, maliciously, wickedly, and corruptly." 2 *Chit. Cr. L.,* 309; *Ar. Cr. Pl.* 429. See also *United States v. Howard,* 132 Fed. Rep., 350 and 351.

In referring to this and kindred questions in the case last cited, Judge Hammond says:

> "The district attorney is certainly correct in his contention that Rev. St. Sec. 1025, precludes the necessity that either one of these essential averments in an indictment for perjury shall be in any particular form, no matter how that form may be sanctioned by precedent and long usage; if the averment appears in any form, or may, by fair construction, be found anywhere within the text of the indictment, it is sufficient."

Judge Hammond cites a large number of decisions by Federal courts illustrating how liberally the Supreme Court of the United States has discarded niceties of form only and requirements that are not material to save the rights of the defendant to be notified of the nature of the offense with which he is charged and to enable him to plead any judgment which may be rendered in the case as a bar to subsequent prosecutions, which is all that he has a right to demand.

In the case of *United States v. Rhodes,* 30 Fed. 431, Mr. Justice Brewer, when he was a circuit court

judge, in construing Sec. 1025 of Rev. St. of the U. S., said:

> "While a defendant should be clearly informed in the indictment of the exact and full charge made against him, yet no defect or imperfection in matter of form only—and this includes the manner of stating a fact—which does not tend to his prejudice, will vitiate the indictment."

Speaking through Circuit Judge Gilbert, this Court applied the same rule, and particularly in the case of *Noah v. United States,* 128 Fed. Rep. 272.

It is alleged in the indictment in the case at bar that at the time of making their false oaths the suborned persons would then be applying to enter and purchase lands of the United States under the Timber and Stone act, in the manner provided by law, and that they would then swear that the lands " were not being purchased by them on speculation " but were being purchased in good faith to be ap- " propriated to the own exclusive use and benefit of " those persons respectively, and that they had not, " directly or indirectly, made any agreement or con- " tract, in any way or manner, with any other per- " son or persons whomsoever by which the titles " which they might acquire from the said United " States in and to such lands should inure in " whole or in part to the benefit of any person " except themselves, when, in truth and in fact, " as each of the said persons would then " well know, and as they the said John Newton

" Williamson, Van Gesner, and Marion R. Biggs,
" would then well know, such persons would be ap-
" plying to purchase such lands on speculation and
" not in good faith to appropriate such lands to
" their own exclusive use and benefit respectively,
" and would have made agreements and contracts
" with them, the said John Newton Williamson, Van
" Gesner, and Marion R. Biggs by which the titles
" which they might acquire from the said United
" States in such lands would inure to the benefit of
" the said John Newton Williamson and Van Gesner
" as co-partners in the firm of Williamson and Ges-
" ner, then and before then engaged in the business
" of sheep raising in said county; the matters so to
" be stated, subscribed, and sworn by the said per-
" sons being material matters under the circum-
" stances and matters which the said persons so to
" be suborned, instigated, and procured, and which
" the said John Newton Williamson, Van Gesner,
" and Marion R. Biggs would not believe to be
" true."

Here is a specific charge that the applicants would swear that they were not taking the lands for speculation and that they were purchasing the lands in good faith to appropriate them to their own exclusive use and benefit respectively, and that they had not, directly or indirectly, made any agreement or contract, in any way or manner, with any other person or persons whomsoever, by which the titles which they might acquire from the United States

in and to such lands should inure in whole or in part to the benefit of any person except themselves, when in truth and in fact they then well knew and the defendants then well knew that they would be applying to purchase such lands on speculation and not in good faith to appropriate such lands to their own exclusive use and benefit respectively, and would have previously made agreements and contracts with the defendants by which the titles which they might acquire from the United States in such lands would inure to the benefit of the defendants, and that the persons so swearing would not then believe their aforesaid statements to be true and that the defendants would not then believe the aforesaid statements of said persons so swearing to be true.

Moreover, it is alleged in the indictment that the defendants conspired "to unlawfully, willfully, and "corruptly suborn, instigate, and procure a large "number of persons, to wit, one hundred persons, "to commit the offense of perjury in the said dis- "trict by taking their oaths there respectively before "a competent officer and person in cases in which a "law of the said United States authorized an oath "to be administered, that they would declare and "depose truly that certain declarations and depo- "sitions by them to be subscribed were true, and by "thereupon, contrary to such oaths, stating and "subscribing material matters contained in such

" declarations and depositions which they should " not believe to be true."

If before making his application to purchase the land the entryman had made and entered into a contract by which his title would inure to the benefit of another, and if his sole purpose in applying to purchase the land was to obtain title to it in order to benefit another person, it is difficult to imagine how it would be possible, under any fair construction of our language, to imply that the taking of his oath in the particulars mentioned would not be willful, false swearing. The elements of willfulness are averred by stating the acts themselves, and the omission of the technical word "willful" becomes immaterial and ought not to vitiate the indictment. The entryman was not bound to apply for the lands, and he did not apply for them inadvertently, and he did not apply for them under duress. On the contrary, it is specifically alleged that before applying for them he entered into an agreement with the defendants that he would apply for them in the manner prescribed by law.

As was said by Justice Brewer, in the case of *United States v. Clark,* 37 Fed. 107:

> "Can it be possible that the defendant was mislead by the language of this indictment as to the exact offense with which he was charged? Did he for a moment suppose that he was charged with putting in the post office something of which he was entirely ignorant, or did he understand from the ordinary meaning of the language used that he was charged with

> putting in the post office an obscene picture—that which he knew to be obscene? I can have no doubt that he was fully informed as to the charge against him, and not in the slightest degree mislead. I am fully aware that there are authorities which do not concur with this view, and yet I think those authorities adhere too closely to the rigor and technicality of the old common-law practice, which, even in criminal matters, is yielding to the more enlightened jurisprudence of the present,—a jurisprudence which looks evermore at the matter of substance and less at the matter of form."

Can it be possible that the defendants in this case were mislead by the language of this indictment, and did not know that they were charged with having conspired to suborn certain persons to wilfully swear falsely? Did the defendants for a moment suppose that they were charged with having conspired to suborn persons to inadvertently or by duress swear falsely?

In the case of *Dunbar v. United States,* 156 U. S. at page 193, Justice Brewer, speaking for the Supreme Court, says:

> "The language of the indictment quoted *excludes the idea of any unintentional and ignorant* bringing into the country of prepared opium upon which the duty had not been paid, and is satisfied only by proof that such bringing in was done intentionally, knowingly, and with intent to defraud the revenues of the United States."

The contract between the defendants and the persons suborned in the case at bar excludes the idea

of any unintentional and ignorant or inadvertent false swearing. Under the circumstances it was utterly impossible for any person, after entering into such a contract, to apply to purchase lands under the Timber and Stone act without willfully and knowingly swearing falsely to matters and things which he did not believe to be true. Everyone is presumed to intend the natural and inevitable consequences of his acts. The persons suborned could not have agreed to convey the land before applying to purchase the same without intending to willfully and knowingly swear falsely in applying to purchase the same.

In the case of *Babcock v. United States,* 34 Fed. 874, Justice Brewer sustained an indictment for subornation of perjury from which the word "willfully" was omitted, and we especially invite the attention of this Court to his statement of the matter at page 876.

In the case of *Wright v. United States,* 108 Fed., at page 810, the Circuit Court of Appeals of the Fifth Circuit, through Circuit Judge Shelby, says:

> "The omission of words that would add nothing to the meaning of an indictment seems so clearly a defect of form only, with the application of this statute (Sec. 1025 R. S. of the U. S.) is apparent."

In that case, that Court said:

> "To apply the language of Mr. Justice Peckham, no one reading the indictment could come to any other conclusion in regard to its mean-

> ing, 'and when this is the case and indictment is good enough.' Price v. U. S., 165 U. S. 311. We think that the Circuit Court did not err in overruling the demurrer to the indictment. So far as it is necessary to protect the real rights of the defendants we cannot adhere too closely to the technicalities of the old common-law practice, but in matters of form not involving substantial rights, the rigor and technicality of such practice 'must yield to the more enlightened jurisprudence of the present.' "

In *Connors v. United States,* 158 U. S. 408, Mr. Justice Harlan, referring to the defects in an indictment, said:

> "Nor, if made by demurrer or by motion and overruled, would it avail on error unless it appeared that the substantial rights of the accused were prejudiced by the refusal of the Court to require a more restricted or specific statement of the particular mode in which the offence charged was committed. Rev. Stat. Sec. 1025. There is no ground whatever to suppose that the accused was taken by surprise in the progress of the trial, or that he was in doubt as to what was the precise offence with which he was charged."

It is not conceivable that in the case at bar the defendants were taken by surprise in the progress of the trial as to whether or not the suborned persons were to willfully swear falsely, or that the defendants were in doubt as to the fact that they were being tried for conspiracy to suborn persons to willfully swear falsely. See also *U. S. v. Adler,* 49 Fed. 736.

In the case of *Rosen v. U. S.*, 161 U. S., at page 33, Justice Harlan, for the Supreme Court, says:

> "Of course he did not understand the Government as claiming that the mere depositing in the postoffice of an obscene, lewd, and lascivious paper was an offense under the statute if the person so depositing it had neither knowledge nor notice, at the time, of its character or its contents. He must have understood from the words of the indictment that the government *imputed* to him the knowledge or notice of the contents of the paper so deposited * * * The case is, therefore, not one of the total omission from the indictment of an essential averment, but, at most, one of the inaccurate and imperfect statement of a fact; and such statement, after verdict, may be taken in the broadest sense authorized by the words used, even if it be adverse to the accused."

And at page 34, of the same case, Justice Harlan says:

> "A defendant is informed of the nature and cause of the accusation against him if the indictment contains such description of the offense charged as will enable him to make his defense and to plead the judgment in bar to any other further prosecution for the same crime."

The word "willful" or "willfully" is defined by *Anderson's Dictionary* as follows:

> "In common parlance willful means intentional as distinguished from accidental or involuntary; in penal statutes it means with evil intent with legal malice without ground for believing the act to be lawful.

> "The ordinary meaning of willful in statutes is not merely involuntary but with a bad purpose."

In *State v. Massey,* 97 N. C., 468, it is held that "willfully" in an indictment implies that the act is done knowingly and of stubborn purpose, but not necessarily of malice. In the case of *Woodhouse v. Rio Grande R. Co.,* 67 Texas 419, it is held that the word "willfully" in referring to an act forbidden by law, means that the act must be done knowingly and intentionally—that with knowledge, the will consenting to, designed and directed the act.

The facts alleged in the indictment in the case at bar raised the necessary implication that the subborned persons would knowingly and intentionally swear falsely with a stubborn purpose, and totally excluded the idea of involuntary action, and, consequently, the allegations are the full equivalent of the word "willfully".

In *Archbold's Cr. Pl.* (Cd. 1900, p. 1213), it is said on the subject:

> "The indictment must in the first place charge a conspiracy. And in stating the object of the conspiracy, the same certainty is not required as in an indictment for the offense, etc., conspired to be committed; as, for instance, an indictment for conspiring to defraud a person of 'divers goods', has been held sufficient. So, an indictment charging a conspiracy 'by divers false pretenses and indirect means to cheat and defraud A of his moneys', and it is not neces-

> sary, in order to sustain such an indictment, to prove such a false pretense as would, if money had been obtained on it by one person alone, have been sufficient to sustain an indictment against him for obtaining money by false pretenses."

The object of an indictment is that the charge be so preferred as to enable the Court to see that the facts amount to a violation of the law, and the prisoner to understand what facts he has to answer or disprove.

Forsythe's Constitutional Law, p. 458.

In the case of *Peters v. United States,* 94 Federal Reporter, 127, speaking through District Judge Hawley, this Court said:

> "The true test of the sufficiency of an indictment is not whether it might possibly have been made more certain, but whether it contains every element of the offense intended to be charged, and sufficiently apprised the defendant of what he must be prepared to meet; and in case any other proceedings are taken against him for the same offense whether the record shows with accuracy to what extent he may plead a former acquittal or conviction." (Citing a large number of decisions by the Supreme Court of the United States.)

Tested by this rule the indictment in the case at bar is clearly sufficient.

POINT 2.

INDICTMENT CLEARLY CHARGES THAT PERJURY WAS TO BE COMMITTED BY APPLICANTS BOTH IN THEIR "SWORN STATEMENTS" OR PRELIMINARY FILING PAPERS AND IN THEIR "DEPOSITIONS" OR FINAL PROOF PAPERS.

Counsel for plaintiffs in error have severely criticised the indictment upon the ground that it fails to enlighten them as to whether or not the perjury was to be committed in the "sworn statement" which, under the law, is the preliminary paper which must be filed by an applicant to purchase lands from the United States in The Timber and Stone Act, or whether the perjury was to be committed in the "final proof" which the applicant is required to make at the time he perfects his application to purchase the land and pays his money to the Government for the same and receives his final certificate. This criticism is not well founded and is based upon a want of knowledge of the technical terms used by the Department of the Interior and the various land offices throughout the United States in describing the acts to be performed and the papers to be subscribed by an applicant for timber lands. When a complete understanding is had of the provisions of the Timber and Stone Act and of the regulations prescribed by the Commissioner of the General Land Office for the purpose of giving effect to said provisions, it becomes apparent that the indictment is a peculiarly well drawn pleading and that the pleader plainly had in his mind the

exact legal definition of the application to purchase timber and stone land and that he used the words "applying to purchase" and "application" and "declaration" and "deposition" with the most accurate regard for the significance of their respective meanings under the timber and stone law.

An analysis of the Timber and Stone Act shows clearly that any person desiring to avail himself of its provisions acquires no vested right and continues to be merely an "applicant to purchase" up to and including the time that he completes his final proof and pays for the land and thus becomes entitled to a "final receipt".

Any person wishing to purchase land under the Timber and Stone Act must file a paper, which is technically described in the provisions of the Act as "a written statement in duplicate". This "written statement" is in every sense of the term an "affidavit" merely and it is in substance and effect a "declaration" of intention to become a purchaser. The law provides that upon the filing of such "statement" notice shall be published for a period of sixty days, and that after the expiration of said sixty days "if no adverse claim shall have been filed " the person DESIRING TO PURCHASE shall furnish to " the Register of the Land Office satisfactory " evidence," etc. Obviously at the end of the sixty day period of publication "the person desiring to purchase" is still merely "applying to enter and purchase" the land in the manner provided by law.

Moreover, at the end of the period of sixty days which is prescribed for the publication of notice the applicant is for the first time called upon to give "satisfactory evidence" of the existence of certain facts, or in other words, he is then, and not until then, called upon under the provisions of the law and the regulations of the Commissioner of the General Land Office, which have been promulgated for the purpose of giving effect to the provisions of the Act, to make and give his "deposition".

The indictment charges that the defendants conspired to suborn, instigate and procure a large number of persons to commit the offense of perjury by taking their oaths that they would declare and depose truly "that certain DECLARATIONS and DEPOSITIONS by them to be subscribed were true" and by thereupon, contrary to said oaths, stating and subscribing material matters contained in such DECLARATIONS and DEPOSITIONS which they should not believe to be true.

The indictment further charges that the defendants conspired to suborn, instigate and procure a large number of persons "to state and subscribe under their oaths that certain public lands of the said United States lying in Crook County in said District of Oregon open to entry and purchase under the Acts of Congress approved June 3, 1878, and August 4, 1902, and known as timber and stone lands, which those persons would then be APPLYING TO ENTER AND PURCHASE in the manner provided by

law, were not being purchased by them on speculation", &c., "when in truth and in fact as each of the said persons would then well know" and as the defendants would then well know "such persons would be APPLYING TO PURCHASE such lands on speculation and not in good faith to appropriate such lands to their own exclusive use and benefit, respectively, and would have made agreements and contracts with them, the said John Newton Williamson, Van Gesner, and Marion R. Biggs, by which the titles they might acquire from the said United States in such lands would inure to the benefit of the said John Newton Williamson and Van Gesner, as co-partners in the firm of Williamson & Van Gesner, then and before then engaged in the business of sheep raising in said county, the matters so to be stated, subscribed and sworn by the said persons being material matters under the circumstances", &c.

The preliminary "written statement" which is required to be filed by any person desiring to avail himself of the provisions of the Timber and Stone Act is designated and described by the General Land Office as a "sworn statement". The blanks issued by the General Land Office and furnished to applicants to be used as a preliminary "declaration of intention to purchase" contains the following printed headlines, to wit:

"Timber and Stone Lands—Sworn Statement."

See Transcript, page 13.

This "sworn statement" is also described by the General Land Office in the same blank in the certificate which must be made by the officer who swears the affiant, as an "affidavit". A copy of the certificate is found on page 14 of the Transcript, and it twice refers to the foregoing "sworn statement" as an affidavit".

The pleader has referred to said "sworn statement" or "affidavit" as a "declaration". The allegation that the person suborned "would declare and depose truly that certain "declarations * * * by them to be subscribed were true" can refer only to the aforesaid "sworn statements" or "affidavits". The word "declarations" specifically and accurately describes such "sworn statements", "written statements" or "affidavits" because said "sworn statements" or "written statements" or "affidavits" are each in substance and effect merely a "declaration of intention to purchase" and consequently such affidavits are properly described as "declarations to be subscribed by the applicants". The term "depositions" would on the contrary, be utterly inappropriate and inapplicable and erroneous. The term "deposition" has a popular as well as a technical legal meaning and while it is a generic expression embracing all written evidence verified by oath and could thus be held to include "an affidavit", yet in legal language a depo-

sition is evidence given by a witness under interrogatories, oral or written, and usually written down by an official person; while an "affidavit" is a mere voluntary act of the party making the oath and is generally taken without the cognizance of him against whom it is to be used.

Stimpson v. Brooks, 3 Blatch. 456.

The General Land Office has adopted this legal meaning of the term "deposition" in its blank forms which are furnished to its officers for the purpose of taking the testimony of persons desiring to purchase lands at the time they are making their final proofs under the Timber and Stone Act. One of these blanks appears at pages 302 to 306, both inclusive, of the Transcript. It contains the following headlines in large print, to wit:

"TIMBER AND STONE LANDS.

Testimony of Claimant."

Following the headlines are printed questions numbered from 1 to 15, both inclusive, and then following the signature of the applicant appears a certificate in these words:

"I hereby certify that the above-named ———— " personally appeared before me; that I verily " believe affiant to be the person he represents him- " self to be; and that each question and answer in " the *foregoing testimony* was read to him in my " presence before he signed his name thereto and

" that the same was subscribed and sworn to before
" me at Prineville, Oregon, this 8th day of Decem-
" ber, 1902.

"

"U. S. Commissioner for District of Oregon.

"NOTE: Every person swearing falsely to the
" above *deposition* is guilty of perjury and will be
" punished as provided by law for such offense. In
" addition thereto the money that may be paid for
" the land is forfeited, and all conveyances of the
" land or of any right, title or claim thereto are
" absolutely null and void as against the United
" States.

"I hereby certify that I have tested the accuracy
" of affiant's information and the bona fides of this
" entry by a close and sufficient oral cross-examina-
" tion of the claimant, and his witnesses, directed
" to ascertain whether the entry is made in good
" faith for the appropriation of the land to the
" entryman's own use and not for sale or specula-
" tion and whether he has conveyed the land or his
" right thereto, or agreed to make any such convey-
" ance, or whether he has directly entered into any
" contract or agreement in any manner with any
" person or persons whomsoever by which the title
" that may be acquired by the entry shall inure
" in whole or in part to the benefit of any person
" or persons except himself, and am satisfied from
" such examination that the entry is made in good
" faith for entryman's own exclusive use, and not

" for sale or speculation, nor in the interest nor for " the benefit of any other person or persons, firm " or corporation.

"M. R. Biggs,
"U. S. Commissioner for District of Oregon."

Another of these blanks commences at page 306 of the Transcript and ends on page 309 thereof. The last mentioned blank contains the printed headline,

"Timber and Stone Lands.

Cross-Examination of Claimant in Connection with Direct Examination on Form 4-370."

This blank contains questions numbered from 1 to 10, both inclusive, and ends as follows, to wit:

" In addition to the foregoing the officer before " whom the proof is made will ask such questions " as seem necessary to bring out the facts in the " case." It will be noticed that the "sworn statement" or "written statement" or "affidavit" is not in the form of questions and answers. It is furnished to the applicants to be filled out by themselves and the officer before whom the applicant swears to the same is merely required to certify that " the foregoing affidavit was read to affiant in my " presence before he signed his name thereto; that " said affiant is to me personally known and that I " verily believe him to be the person he represents " himself to be; and that this affidavit was sub- " scribed and sworn to before me this "30th day of " June, 1902".

It is at once apparent that neither the law nor the regulations of the General Land Office contemplate or require that the officer before whom such "sworn statement" or "written statement" or "affidavit" is made shall question or cross-examine the applicant for the purpose of testing the truth or accuracy of the statements contained in his affidavit.

It is equally apparent that the regulations and instructions of the General Land Office do contemplate and require that the officer before whom the "final proof" is made and taken shall interrogate and cross-examine the applicant thoroughly for the express purpose of testing the accuracy and truth of his sworn statements.

In other words, the preliminary paper, which is called a "Sworn statement" or "affidavit" by the General Land Office and which is designated in and by its blanks as such has every element of a mere "affidavit" and is not in any legal sense a deposition".

While, on the other hand, the testimony of the claimant and his witness, which an officer of the Government is required to take at the time the applicant is making his final proof, has every legal element of what is technically termed in law a "deposition". Moreover, this testimony is designated in all the blanks furnished to its officers by the General Land Office for this purpose as a "deposition".

It seems transparently apparent, therefore, that

the pleader in the case at bar used the term "deposition" in its legal sense and in the same sense in which it is used by the General Land Office in its blank forms which are furnished to its officers for the purpose of taking the final proofs of applicants to purchase timber lands. This construction is emphasized by the fact that the pleader has alleged that the persons suborned to commit perjury "would " declare and depose truly that certain declarations " AND depositions by them to be subscribed were " true". If he had said declarations "OR" depositions it would be apparent that he used the two terms synonymously, but he has carefully selected the word "and" instead of the word "or" to accomplish the purpose of his pleading, and it is apparent that the persons applying to purchase the lands were to be suborned to commit perjury at all stages of the proceedings wherein it might become necessary to falsely swear that they had made no contracts to dispose of the lands in order to accomplish their purpose of obtaining title thereto from the United States. In the very nature of things the conspirators must have intended to induce the persons who applied to purchase the lands to swear falsely not only in the preliminary paper called a "sworn statement" or "written statement" or "affidavit" or "declaration", but likewise in giving testimony at the time of making final proof, or in other words, in their "depositions". Obviously, it was the purpose of the conspirators to obtain title to the lands and this could not be done unless the persons

who applied to purchase the same under the Timber and Stone Act would continue to swear falsely at the time of making final proof, and the pleader must have had these facts in his mind when preparing the indictment, and the evidence contained in the transcript of record clearly shows that he did have such facts in his mind and that he intended to and did express this exact meaning in the indictment by the terms "declarations and depositions".

In what sense, therefore, did the pleader use the term "declarations"?

Under the pre-emption laws, so called, every person possessing certain qualifications is entitled to enter one hundred and sixty acres of land after first making a settlement upon the same. Every person who settles upon public land and intends to purchase the same under the pre-emption laws is required by Sec. 2264 of the Revised Statutes of the United States to file within thirty days after the date of such settlement with the Register of the proper district a "written statement" describing the land settled upon and "declaring his intention to claim the same" under the pre-emption laws. A preliminary paper which he is thus required to sign, swear to and file, has always been known and designated by the General Land Office and by the public as a "declaratory statement". The General Land Office furnished blank forms for many years for the use of applicants under the pre-emption laws and those forms contained the printed headlines "declar-

atory statement". The pleader evidently had this in mind when he referred to the applicant's preliminary statement under this Timber and Stone Act as a "declaration". It is unquestionably in substance and effect a "declaration of intention" because the applicant therein "declares his intention to purchase" the land under the Timber and Stone Act, just as a pre-emption claimant in his "declaratory statement" in accordance with the requirements of Sec. 2264, Rev. St. of the U. S., "declares his intention to claim the land under the pre-emption laws".

If the pleader had used the word "affidavits", or the words "sworn statements", instead of the word "declarations", there could have been no shadow of a doubt about his meaning. The word "declarations", however, has been defined by the Supreme Court of the United States in the case of *United States v. Ambrose,* 108 U. S., 340, by Justice Miller as the same as used in Sec. 5392 of the Rev. St. of the U. S. defining perjury. That statute provides that "every person who having taken an oath " before a competent tribunal, officer, or person in " any case in which a law of the United States " authorizes an oath to be administered, that he " will testify, declare, depose, or certify truly, or " that any written testimony, declaration, deposi- " tion or certificate by him subscribed is true, will- " fully and contrary to such oath states or sub- " scribes any material matter which he does not " believe to be true is guilty of perjury", etc.

It will be noticed that the word "affidavit" and the words "sworn statement" are not used in that definition of perjury. No one of the words used in that definition will cover a simple "affidavit" or "sworn statement", unless it be the word "declaration".

In the case just cited, Justice Miller says:

> "We do not think the words declaration and certificate as used in the section of the Revised Statutes on which this indictment is founded are used as terms of art or in any technical sense, but are used in an ordinary and popular sense to signify any statement or material matters or facts subscribed and sworn to by the parties charged."

He further says:

> "The fact that in many acts of Congress cited by counsel, that body has used the word to signify a statement in writing, whether sworn to or not, as a foundation in many cases of official actions, or as *preliminary to the assertion of rights by the party who makes the declaration,* is far from proving that the use of the word in the act concerning perjury is limited to these cases. The inference is strong the other way, for the word is used in the case cited in regard to so many and such divers transactions that it can, in view of them all, have no other meaning than what is attached to it in ordinary use, and in all these instances it is equivalent to a statement of fact material to the matter in hand."

In that case the defendant, who was Clerk of the Circuit and District Courts for that district, was indicted for perjury in swearing before the Dis-

trict Judge in his emolument returns and an account for services rendered to the United States. The Supreme Court held that such a paper was a "declaration" within the meaning of the section just quoted from, defining perjury.

It is contended by attorneys for defendants, however, that the only overt acts set forth in the indictment consists of the aforesaid "sworn statements" which were filed as preliminary papers by the various applicants whom the defendants induced to purchase land for their benefit. It is argued that these overt acts so alleged conclusively prove that the pleader was referring only to such "sworn statements" by the words "declarations" and "depositions". It must not be forgotten, however, that *conspiracy* is the crime charged in the indictment, and the act done to effect the object of the same merely affords a *locus penitentia,* so that before the act done either one or all the defendants may abandon their design and thus avoid the penalty prescribed by the statute. It follows therefore that the conspiracy must be sufficiently charged, and the indictment cannot be aided by the averments of acts done by one or more of the alleged conspirators in furtherance of the object of the conspiracy. It necessarily follows that such overt acts should not be considered in determining the proper construction to be given to the charging part of the indictment, because the pleader must have known what the law was upon this subject; and consequently

the overt acts alleged throw no light upon his intentions.

United States v. Britton, 108 U. S. 199;
Pettibone v. United States, 148 U. S. 197;
United States v. Milner, 36 Fed. 890;
In re Greene, 52 Fed. 111;
In re Benson, 58 Fed. 971.

Moreover, the defendants were not taken by surprise by this construction of the indictment, although it is true that Judge DeHaven, who presided at the first two trials of the case, restricted the evidence to proof of perjury in the preliminary "affidavit", or "sworn statement", of the applicant. The prosecution contended at each trial that the United States was entitled under the indictment to prove false swearing on the part of the applicants at the time of making the "final proof", as well at the time of filing the preliminary "sworn statement", or declaration of intention to purchase. Judge Hunt presided at the third trial of the case and sustained this contention on the part of the prosecution, and Judge Hunt had so ruled, as shown by the transcript of record. The prosecution put in evidence, without objection on the part of defendants, the "final proof" testimony of the applicant B. F. Jones. See transcript of record, pp. 175 to 183, both inclusive.

Moreover, the defendants, through their attorneys, specifically objected upon this third trial to an admission of any evidence tending to prove that the

applicants swore falsely in the preliminary paper called and designated a "sworn statement".

At p. 227 of the record, the following appears: "And thereupon the defendants objected to each of "said papers [the duplicate "sworn statements" or "preliminary application papers of Green Beard] "upon the ground that the indictment does not state "any indictable offense, and upon the further ground "that each of said papers varies from the indict- "ment; that it is not any DEPOSITION or declaration "such as is mentioned in the indictment; that it is "not such a paper as can be made the basis of an "indictment for perjury, and is variant from the "indictment. Whereupon the objection was over- "ruled by the Court, and the defendants excepted "to the ruling upon each paper, and their excep- "tions were allowed. And thereafter like applica- "tions of each and all of the other applicants here- "inbefore designated, except the applicant Jones, "was offered and received and put in evidence sub- "ject to the same objections and exceptions on be- "half of the defendants, and it was stipulated and "agreed that such objections should apply to each "of these sworn statements."

The words in brackets are inserted by the writer to explain the text; and at pages 237 and 238 of the record, the following appears:

"Mr. HENEY: We will offer these two papers in "evidence.

"Mr. BENNETT: For the purpose of making the

" record complete, we want to make the objection " we made on yesterday a little more elaborate. We " object to each of these papers upon the ground " that the indictment does not state any indictable " offense; upon further ground that each of these " papers varies from the indictment; that it is not " any DEPOSITION or declaration such as is mentioned " in the indictment; that it is not such a paper as " can be made the basis of an indictment for per- " jury, and is variant from the indictment. I would " like to have this objection go to each of these dif- " ferent papers without interposing it each time.

" The COURT: Have you any objection to that, " Mr. Heney?

" Mr. HENEY: None whatever.

" The COURT: It may be considered as applying " to all papers of like tenor to those now introduced.

" Mr. BENNETT: This is the sworn statement.

" The COURT: And the objections are overruled, " and the defendants allowed an exception."

Green Beard was then upon the stand, and he was only the second witness who had been called upon the part of the prosecution at that time, and consequently it is apparent that the attorneys for the defendants "commenced to blow hot and then to blow cold" at an early stage of the proceedings during this trial upon the questions of law which they now contend are vitally important in this case.

At and during the trial they contended that perjury could not be committed by an applicant in the pre-

liminary "sworn statement" that he is required to file when applying to purchase land under the Timber and Stone Act. And they then further contended that the words "declarations and depositions" which are used in the indictment do not mean or refer to said "sworn statement" or preliminary paper which must be filed by the applicant. Upon this appeal the attorneys for defendants are strenuously contending exactly to the contrary, and are now insisting that perjury could be committed by the applicant ONLY in his preliminary filing paper or "sworn statement", and that the words "declarations and depositions" as used in the indictment can refer and do refer ONLY to said "sworn statement".

This brings us naturally to a discussion of the next important question upon this appeal.

III.

THE SECRETARY OF INTERIOR AND COMMISSIONER OF GENERAL LAND OFFICE HAVE POWER TO MAKE REGULATIONS REQUIRING A PERSON APPLYING TO PURCHASE TIMBER LANDS, UNDER THE TIMBER AND STONE ACT, TO FURNISH EVIDENCE, UNDER OATH, AT THE TIME OF FINAL PROOF, THAT HE DOES NOT APPLY TO PURCHASE THE SAME ON SPECULATION, BUT IN GOOD FAITH TO APPROPRIATE IT TO HIS OWN EXCLUSIVE USE AND BENEFIT, AND THAT HE HAS NOT, DIRECTLY OR INDIRECTLY, MADE ANY AGREEMENT OR CONTRACT, IN ANY WAY OR MANNER, WITH ANY PERSON OR PERSONS WHATSOEVER, BY WHICH THE TITLE WHICH HE MIGHT ACQUIRE FROM THE GOVERNMENT OF THE UNITED STATES SHOULD INURE, IN WHOLE OR IN PART, TO THE BENEFIT OF ANY PERSON EXCEPT HIMSELF. SUCH REGULATIONS ARE REASONABLE AND NECESSARY TO GIVE EFFECT TO THE PROVISIONS OF THE TIMBER AND STONE ACT, AND CONSEQUENTLY WHEN MADE THEY HAVE THE FORCE AND EFFECT OF LAW; AND ANY PERSON WHO SWEARS FALSELY WHEN GIVING SUCH TESTIMONY IS GUILTY OF PERJURY UNDER SECTION 5392, REVISED STATUTES OF THE UNITED STATES.

Section 3 of an Act for the sale of timber lands in the States of California, Oregon, Nevada and Washington Territory (20 Stat. 89) reads as follows:

> "Effect shall be given to the foregoing provisions of this act by regulations to be prescribed by the Commissioner of the General Land Office."

The general power to make reasonable regulations for giving effect to the provisions of the Timber and Stone Act existed in the Commissioner of the Gen-

eral Land Office, however, by virtue of the provisions of the Revised Statutes of the United States, sections 441, 453 and 2478.

By the act of May 29, 1830 (4 Stat. 420), the right of pre-emption was given to certain settlers on the public lands. Section 3 was similar to the Timber and Stone Act, in that it required that prior to any entry "proof of settlement or improvement shall be made to the satisfaction of the register and receiver."

In *Lytle v. Arkansas,* 9 How. 314, 333, it was held that their decision was conclusive upon the questions of settlement and improvement, the Court saying:

> "The register and receiver were constituted, by the act, a tribunal to determine the rights of those who claimed pre-emptions under it. From their decision no appeal was given. If, therefore, they acted within their powers, as sanctioned by the Commissioner, and within the law, and the decision cannot be impeached on the ground of fraud or unfairness, it must be considered final."

Subsequently, and on July 4, 1836 (5 Stat. 107), Congress, without any repeal of the Act of 1830, passed an act to reorganize the General Land Office, the first section of which is as follows:

> "That from and after the passage of this act, the executive duties now prescribed, or which may hereafter be prescribed by law, appertaining to the surveying and sale of the public lands of the United States, or in anywise respecting such public lands and, also, such as relate to private claims of land, and the issuing of patents for all grants of land under the author-

> ity of the Government of the United States, shall be subject to the supervision and control of the Commissioner of the General Land Office, under the direction of the President of the United States."

This question, so far as any question her is concerned, was substantially carried forward into the Revised Statutes, as section 453, and is still in force. Under this law the case of *Barnard's Heirs v. Ashley's Heirs,* 18 How. 43, arose. It was there contended, in accordance with the prior cases, that the decision of the register and receiver was final and conclusive, but, the entries having been made on *ex parte* affidavits, the right of review by the Commissioner of the General Land Office was sustained, the Court saying:

> "The necessity of 'supervision and control', vested in the Commissioner, acting under the direction of the President, is too manifest to require comment, further than to say that the facts found in this record show that nothing is more easily done than apparently to establish, by *ex parte* affidavits, cultivation and possession of particular quarter sections of land, when the fact is untrue. That the act of 1836 modifies the powers of registers and receivers to the extent of the Commissioner's action in the instances before us, we hold to be true. But, if the construction of the act of 1836, to this effect, were doubtful, the practice under it for nearly twenty years could not be disturbed without manifest impropriety."

The right of the Secretary of the Interior and of the Commissioner of the General Land Office to sup-

ervise the sale and disposition of the public domain has never been successfully questioned since the passage of said Act of 1836. In considering these powers under sections 441, 453 and 2478 of the Revised Statutes, Mr. Justice Lamar, speaking for the Court, in the case of *Knight v. Land Association,* 142 U. S. 161, said:

> "The phrase, 'under the direction of the Secretary of the Interior', as used in these sections of the statutes, is not meaningless, but was intended as an expression in general terms of the power of the Secretary to supervise and control the extensive operations of the land department of which he is the head. It means that, in the important matters relating to the sale and disposition of the public domain, the surveying of private land claims and the issuing of patents thereon, and the administration of the trusts devolving upon the Government, by reason of the laws of Congress or under treaty stipulations, respecting the public domain, the Secretary of the Interior is the *supervising agent* of the Government to do justice to all claimants and preserve the rights of the people of the United States. As was said by the Secretary of the Interior on the application for the recall and cancellation of the patent in this pueblo case (5 Land Dec. 494): 'The statutes in placing the whole business of the department under the supervision of the Secretary, invest him with authority to review, reverse, amend, annul or affirm all proceedings in the department having for their ultimate object to secure the alienation of any portion of the public lands, or the adjustment of private claims to lands, with a just regard to the *rights of the public* and of private parties. Such supervision may be exercised *by direct orders or by review* on appeals.

The mode in which the supervision shall be exercised in the absence of statutory direction may be prescribed by such rules and regulations as the Secretary may adopt. When proceedings affecting titles to lands are before the department the power of supervision may be exercised by the Secretary, whether these proceedings are called to his attention by formal notice or by appeal. It is sufficient that they are brought to his notice. The rules prescribed are designed to *facilitate* the department in the despatch of business, *not to defeat* the supervision of the Secretary. For example, if, when a patent is about to issue, the Secretary should discover a fatal defect in the proceedings, or that by reason of some newly ascertained fact the patent, if issued, would have to be annulled, and that it would be his duty to ask the Attorney General to institute proceedings for its annulment, it would hardly be seriously contended that the Secretary might not interfere and prevent the execution of the patent. He could not be obliged to sit quietly and allow a proceeding to be consummated, which it would be immediately his duty to ask the Attorney General to take measures to annul. It would not be a sufficient answer against the exercise of his power that no appeal had been taken to him, and therefore he was without authority in the matter."

In the case of *Orchard v. Alexander,* 157 U. S. at page 385, the Supreme Court, speaking through Mr. Justice Brewer, says:

"While it is within the discretion of Congress to segregate any particular step in the proceedings for the disposal of the public lands from the scope of the general system, and place it outside of and beyond any supervising control of the higher officers, yet the courts should be

> satisfied that the language indicates an intention on the part of Congress so to do before any such break in the harmony of the system is adjudged."

The conclusions reached by Mr. Justice Lamar, in the case of *Knight v. Land Association,* are fully approved, and are reaffirmed in the case of *Orchard v. Alexander.*

The same rule was announced by the Supreme Court in the case of *Cornelius v. Kessel,* 128 U. S., at page 461, and, speaking through Mr. Justice Field, the Court there said:

> "The exercise of this power is necessary to the due administration of the land department. If an investigation of the validity of such entries were required in the courts of law before they could be cancelled, the necessary delays attending the examination would greatly impair, if not destroy, the efficiency of the department. But the power of supervision and correction is not an unlimited or an arbitrary power. It can be exerted only when the entry was made upon false testimony, or without authority of law. It cannot be exercised so as to deprive any person of land lawfully entered and paid for. By such entry and payment the purchaser secures a vested interest in the property and a right to a patent therefor, and can no more be deprived of it by order of the Commissioner than he can be deprived by such order of any other lawfully acquired property. Any attempted deprivation in that way of such interest will be corrected whenever the matter is presented so that the judiciary can act upon it."

It should be noticed that the general power of supervision includes the right on the part of the

Commissioner of the General Land Office to annul entries of land allowed by the register and receiver of the local land office when the entry was made upon "FALSE TESTIMONY." This necessarily includes the power to adopt proper means by which to discover whether or not "false testimony" was given by the applicant in the Local Land Office. The power to annul an entry after it has been made necessarily includes the power to prevent an entry from being made in the first instance upon false testimony, and secondly includes the power to make proper rules and regulations to govern the character of testimony which shall be required, and the manner in which it shall be taken in order to affect the object and policy of the law.

Under the Timber and Stone Act an "entry" is not made until the final proof is made, and the applicant has paid his money to the Government through the local land officers, and has received his final certificate. In the case of *Parsons v. Venzke,* 164 U. S. at page 92, the Court, speaking through Mr. Justice Brewer, said:

> "An entry is a contract. Whenever the local land officers approve the evidences of settlement and improvement and receive the cash price they issue a receiver's receipt. Thereby a contract is entered into between the United States and the pre-emptor, and that contract is known as an entry. It may be like other contracts, voidable, and is voidable if fraudulently and unlawfully made. The effect of the entry is to segregate the land entered from the public domain, and while subject to such entry it can not be appropriated to any other person or for

any other purposes. It would not pass under a land grant, no matter how irregular or fraudulent the entry. When by due proceedings in the proper tribunal the entry is set aside and cancelled, the contract is also terminated. The voidable contract has been avoided. There is no longer a contract, no longer an entry, and the land is as free for disposal by the land department as though no entry had ever been attempted."

In the case of a Timber and Stone entry, as we have seen, the person desiring to avail himself of the provisions of the act, must file with the Register of the proper district, a written statement in duplicate, describing the land, and setting forth certain facts, including the statement "that he does not " apply to purchase the same on speculation, but in " good faith to appropriate it to his own exclusive " use and benefit, and that he has not directly or " indirectly made any agreement or contract, in any " way or manner, with any person or persons what- " soever, by which the title which he might acquire " from the Government of the United States should " inure in whole or in part to the benefit of any per- " son except himself".

It is provided further in the Act, that this statement must be verified by the oath of the applicant; that if any person taking such oath shall swear falsely in the premises he shall be subject to all the pains and penalties of perjury, and shall forfeit the money which he may have paid for such lands, and all right and title to the same, and that any grant or con-

veyance which he may have made, except in the hands of bona fide purchasers, shall be null and void.

It further provides that, upon the filing of such statement, the Register of the Land Office shall post a notice of such application, embracing a description of the land by legal subdivisions, in his office, for a period of sixty days, and shall furnish the applicant a copy of the same for publication, at the expense of such applicant, in a newspaper published nearest the location of the premises, for a like period of time; and that after the expiration of said sixty days, if no adverse claim shall have been filed, *the person desiring to purchase* shall furnish to the Register of the Land Office satisfactory affidavits, first, that said notice of the application prepared by the register as aforesaid, was duly published in a newspaper as herein required; secondly, that the land is of the character contemplated in this Act, unoccupied and without improvements, other than those excepted, either mining or agricultural, and that it apparently contains no valuable deposits of gold, silver, cinnabar, copper or coal; and that, upon payment to the proper officer of the purchase money of said land, together with the fees of the Register and Receiver, as provided for in case of mining claims in the twelfth section of the Act approved May tenth, eighteen hundred and seventy-two, the applicant may be permitted to *"enter"* said tract, and, on the transmission to the General Land Office of the

"papers and testimony" in the case, a patent shall issue thereon; provided, that any person having a valid claim to any portion of the land may object, in writing, to the issuance of a patent to lands so held by him, stating the nature of his claim thereto; and that evidence shall be taken, and the merits of said objection shall be determined by the Officers of the Land Office, subject to appeal, as in other land cases; and that "effect shall be given to the foregoing pro- " visions of this Act by regulations to be prescribed " by the Commissioner of the General Land Office".

In the first section of the Act it is provided, lands valuable chiefly for timber but unfit for cultivation and which have not been offered for public sale according to law, may be sold to citizens of the United States, or persons who have declared their intention to become such, in quantities not exceeding one hundred and sixty acres to any one person or association of persons, at the minimum price of two dollars and fifty cents per acre.

It is vitally important to notice that the clear intent of the statute is that such lands shall be sold *" in quantities not exceeding one hundred and sixty " acres to any one person or association of persons"*.

The land is not sold until the *"entry"* is made, or in other words, until the money has been received by the Government and the final certificate or receiver's receipt for the money is delivered to the applicant. The law expressly provides that not more than one hundred and sixty acres of land shall be

sold to any one person, and consequently it necessarily follows that no one person is entitled to secure a final certificate or receiver's receipt for any quantity of land in excess of one hundred and sixty acres.

It is contended by attorneys for defendants, that the applicant has the right to sell the land the moment that he has filed his "sworn statement" in duplicate with the Register and Receiver of the Land Office, declaring his intention and desire to purchase the land. If this contention is correct, it must be apparent that any one person could lawfully secure an assignment from ten thousand or more persons who had made applications to purchase one hundred and sixty acres of land each, and could produce those assignments at the Local Land Office and could thereby utterly and absolutely defeat the express purpose and intent of the law by thus compelling vast quantities of land to be "sold" to him by the United States at the minimum price fixed by the Government. A construction which would produce such absurd and evil consequences will not be adopted by the courts unless the language of the law clearly and expressly requires it.

The policy of the Timber and Stone Act is similar to that of the Homestead and Preemption Acts. It is to enable every citizen of the United States to profit by the generosity of the Government, by securing not to exceed one hundred and sixty acres of land, valuable chiefly for its timber, and by holding such land for his own profit and exclusive use and benefit

until it has increased in value through the development of the surrounding country. It is true that as soon as the land has been "sold" to him by the Government, or in other words, as soon as his "entry" has been allowed and accepted by his payment for the land, and the issuance to him of a final certificate or receiver's receipt, he can immediately resell the land to any person who may be willing to purchase it. The law contemplates, however, that every person who has sufficient means with which to purchase one hundred and sixty acres of timber land, exclusively for his own benefit, or who is able to borrow the money with which to make such purchase, will be able to retain the ownership thereof until he is offered and receives at least the then market price of that land. This being true, large quantities of such land would not be so apt to be acquired by any one person, or association of persons. If, however, persons without any means or credit whatsoever can apply to purchase such lands and sell the right to purchase from the Government immediately after filing such application, and before the land has in fact been sold to them, it necessarily follows that the very object and purpose of the Act will be consistently defeated, and that every person who desires to acquire large quantities of the public timber lands of the United States can do so by paying a nominal price for his right of purchase to every person who is willing to swear falsely, by filing an application stating that he desires to purchase the land for his own use and benefit.

In the case of *U. S. v. Budd,* 144 U. S. at page 163, the Supreme Court, speaking through Justice Brewer, in construing the Timber and Stone Act, said:

> "The Act does not in any respect limit the dominion which the purchaser has over the land *after its purchase* from the Government, or restrict in the slightest his power of alienation. All that it denounces is a prior agreement, the acting for another *in the purchase. If when the title passes from the Government* no one save the purchaser has any claim upon it, *or any contract or agreement for it,* the act is satisfied. Montgomery might rightfully go or send into that vicinity and make known generally, or to individuals, a willingness to buy timber land at a price in excess of that which it would cost to obtain it from the Government; and any person knowing of that offer might rightfully go to the land office and make application *and purchase* a timber tract from the Government, and the facts above stated point as naturally to such a state of affairs as to a violation of the law by definite agreement *prior to any purchase* from the Government, point to it even more naturally, for no man is presumed to do wrong or to violate the law, and every man is presumed to know the law. And in this respect the case does not rest on presumptions, for the testimony shows that Montgomery knew the statutory limitations concerning the acquisition of such lands, and the penalties attached to any previous arrangement with the patentee for their purchase. Nor is this a case in which one particular tract was the special object of desire, and in which, *therefore, it might be presumed that many things would be risked in order to obtain it;* for it is clear from the testimony that *not the land, but the timber* was Montgomery's

> object, and any tract bearing the quality and quantity of timber (and there were many such tracts in that vicinity) satisfied his purpose. This is evident, among other things, from the testimony of one Tipperry, upon which some reliance is placed by the Government, which was that Montgomery offered him one hundred dollars besides all his expenses if he would take a timber claim in that vicinity (no particular tract being named) and afterwards sell it to him."

It will be noticed that the Supreme Court assumes that Congress did not intend by this Act to in any respect limit the dominion which the purchaser would have over the land *"after it is purchased"* from the Government. The Court is particular to state, however, that the Act does denounce a "prior agreement", to wit, "the acting for another *in the purchase"*. And then the Court proceeds to say that the Act is satisfied "if *when the title passes* " *from the Government* no one save the purchaser " has any claim upon it, or any contract or agree- " ment for it".

We have seen that even the equitable title (which is evidently the one referred to by the Supreme Court) does not pass from the Government until the applicant pays the purchase money and receives his final certificate or receiver's receipt. It will be remembered that the Act itself, in section 3 thereof, provides that

> "After the expiration of said sixty days (of publication of notice), if no adverse claim shall have been filed, the person *desiring to purchase*

> shall furnish to the register of the land office satisfactory evidence", and that "upon payment to the proper officer of the purchase money of said land, together with the fees of the register and receiver", etc., "the applicant may be permitted to *enter* said tract, and on the transmission to the General Land Office of the papers and testimony in the case a patent shall issue thereon."

In other words, the person desiring to purchase is styled "an applicant" to purchase up to the time that he pays his money for the land, and thus becomes entitled to "enter" the tract for which he is applying. Up to the very moment that the Government accepts his money for the land, it can withdraw its offer to sell the same to him, or change the terms of its offer by appropriate legislation, and he would have no right or remedy which the courts could recognize. He has no *vested* right or interest in the land until his final proofs have been approved by the Register and Receiver, and his money accepted by them, and the Receiver's receipt for the same delivered to him. At that moment, but not until then, he becomes the purchaser of the land. That "entry" is the sale which is referred to in the first section of the Act by the provision that lands valuable chiefly for timber, but unfit for cultivation, "may be sold to citizens of the United States, or "persons who have declared their intention to "become such, in quantities not exceeding one hun- "dred and sixty acres to any one person, or asso- "ciation of persons, at the minimum price of two

" dollars and fifty cents per acre". No one person is permitted to "purchase" from the Government more than one hundred and sixty acres of land, and the Act denounces a prior agreement "the acting for another *in the purchase*". When the title passes from the Government (to wit, when the final proof is made, and the money paid for the land, and the "entry" is allowed), if "no one save the purchaser " has any claim upon it, or any contract or agree- " ment for it, the Act is satisfied". And, on the contrary, if any person has a claim upon it, or if the record purchaser, or applicant to purchase, has sold or agreed to sell it at any time prior to the making of his final proof, and his payment of the purchase price to the Government for the land, the law is violated.

The case of *United States v. Budd,* is instructive in other particulars, and it will be referred to again in discussing the objections to evidence which have been urged by the attorneys for defendants, in the cases at bar.

In the case of *Hawley v. Diller,* 178 U. S., page 481, the Supreme Court, speaking through Justice Harlan, in sustaining the power of the Secretary of the Interior upon his own motion to set aside, cancel and annul an "entry" of timber land, upon the ground that the applicant made the entry in the interest of another person, says:

> "In the course of his opinion Secretary Smith said that there was no charge nor was there

> any testimony affecting the transaction between Bailey and his transferees. He also said that his interpretation of the statute did not imply that a timberland entryman was not authorized to sell his entry at any time that he chose *after he had made his proof and received his certificate.*"

By clear inference and strong implication, it is held that the applicant cannot sell his right to enter the land *before* he has made his proof and received his certificate.

At page 488 of the Opinion, in the same case, the Court says:

> "It is contended that the Land Department was without jurisdiction to cancel the original entry. The exclusion of mere speculators from purchasing the public lands referred to in the Timber and Stone Act would be of no practical value if it were true that one having purchased in good faith from an entryman who is proved to have sworn falsely in his application, could demand, of right, that a patent be issued to him. The Land Department has authority, at any time before a patent is issued, to inquire whether the original entry was in conformity with the Act of Congress. *Knight v. United States Land Association,* 142 U. S. 161, and *Michigan Land & Lumber Co. v. Rust,* 168 U. S. 589, 593, and authorities cited in each case. Of course, that Department could not arbitrarily destroy the equitable title acquired by the entryman and held by him or his assignee."

The word "application" in the foregoing quotation is unquestionably used in the broad sense of including all the proceedings from the time the party desiring to purchase files his "written state-

ment'' or ''sworn statement'', up to and including the making of his final proof, and the payment of his purchase money, and the delivery to him by the Receiver and Register of the Land Office of his final certificate by the Receiver's receipt.

But it is contended by the attorneys for defendants that it is not the policy of the Timber and Stone Act to deprive an applicant of the right to sell his privilege to purchase, before he has actually exercised the same by making final proof and paying for the land, provided, only, that he does not enter into any agreement to sell the land prior to the filing of his preliminary ''written statement'' or ''sworn statement'' in and by which he gives notice that he desires to purchase the land. They state the case of *Adams v. Church,* 193 U. S. 510, as conclusive upon this point. That case deals with the entry under the ''Timber Culture'' Act, which is ''An Act to '' encourage the growth of timber on the western '' prairies''.

Upon filing his preliminary affidavit under that Act with the Receiver and Register, and on payment of ten dollars, if the tract applied for is more than eighty acres, and five dollars if it is eighty acres or less, the applicant is immediately permitted to *''enter''* the quantity of land specified. In other words, he then immediately acquires a *vested* interest in the land of which he cannot be arbitrarily deprived by the Government, by legislation or otherwise. Moreover, as soon as he has been permitted

to "enter" the land the party is required, if he has made an entry of a quarter section, "to break or "plow five acres covered thereby the first year; five "acres the second year, and to cultivate to crop, or "otherwise, the five acres broken or plowed the first "year; the third year he shall cultivate to crop, or "otherwise, the five acres broken the second year, "and to plant in timber, seeds or cuttings, the five "acres first broken or plowed, and to cultivate and "put in crop, or otherwise, the remaining five acres; "and the fourth year to plant in timber, seeds or cut- "tings, the remaining five acres. All entries of less "quantity than one-quarter sections, shall be "plowed, planted, cultivated to trees, tree seeds, or "cuttings in the same manner and in the same pro- "portion as hereinbefore provided for the quarter "section," etc.

It must be at once apparent that this "Timber Culture Act" is in no way analogous to the Timber and Stone Act. All the provisions of the Timber Culture Act are intended and calculated to benefit the Government, and the public generally, as much as the applicant. He is required to expend his time and money in improving and cultivating the land, and he cannot acquire title until the expiration of eight years from the date of his entry. And he must then prove "that not less than twenty-seven "hundred trees were planted on each acre, and that "at the time of making such proof there is still "growing at least six hundred and seventy-five liv-

" ing and thrifty trees to each acre." The applicant under that Act acquires a vested interest in the land the moment his application is accepted by the Register and Receiver of the Land Office. His entry having been allowed, and the proper Land Office fees having been paid, he becomes the equitable owner of the land, subject, of course, to the conditions precedent which are prescribed by the law. At the time he makes his entry, he may be perfectly able, financially, to comply with the provisions of the law, but before the expiration of the long period of eight years, he may have become financially embarrassed, or may have other reasons to desire to remove from the vicinity of the land, and it would be a great hardship and unconscionable condition if he were not permitted to sell his interest in the land to any other person who would be willing to accept and comply with the conditions prescribed by the law. It is not the policy of that law to prevent the original entryman from conveying his interest in the land before the issuance of patent, because it is to the advantage of the Government to have the provisions of the law complied with in respect to the planting of trees thereon by some person, and it is immaterial whether this planting is done by the original applicant or his assignee.

None of the reasons which apply to the Timber Culture Act have any bearing whatever upon the beneficent provisions of the Timber and Stone Act. Under the latter law, the applicant is not required

to do anything to improve the land, or to benefit the applicant or general public, and he is permitted to acquire title to the land at a price which is far below the market value of the timber alone which is on the land, in the great majority of instances. The provision in the Timber and Stone Act, that the land shall not be sold to any one person, or association of persons, in quantities exceeding one hundred and sixty acres, is as clear an expression of legislative intent as a direct prohibition against the alienation of the land prior to purchase. And particularly so when read in connection with sections 2 and 3 of the Act. It is inconceivable that Congress intended to permit a person to sell his privilege to purchase before he had acquired any vested interest in the land. If this is the proper construction of the law, it is difficult to understand why Congress required the applicant to file a "written statement", under oath, alleging "that he does not apply to purchase " the land on speculation, but in good faith to appro- " priate it to his own exclusive use and benefit, and " that he has not, directly or indirectly, made any " agreement or contract, in any way or manner, " with any person or persons whatsoever, by which " the title which he might acquire from the Govern- " ment of the United States, should inure, in whole " or in part, to the benefit of any person except him- " self".

It is submitted, therefore, that the whole policy of the Government, in respect to its timber lands,

can be thwarted if the applicant is permitted to alienate the land prior to the consummation of his purchase, by the payment of the purchase price to the Government, and the approval of his final proof and allowance of his entry.

If it is the policy of the Timber and Stone Act to withhold the power of alienation from the person desiring to purchase the land until he has completed his entry by making his final proof, and paying the purchase price for the land, it necessarily follows that the Commissioner of the General Land Office not only possesses authority to make rules and regulations requiring the applicant to testify, at the time of making final proof, that he does not apply to purchase the land on speculation but in good faith to appropriate it to his own exclusive use and benefit, and that he has not, directly or indirectly, made any agreement or contract, in any way or manner, with any person or persons whatsoever, by which the title which he might acquire from the Government of the United States, should inure, in whole or in part, to the benefit of any person except himself; but it is the unquestioned duty of the Commissioner of the General Land Office to make and enforce such rules and regulations for the protection of the Government.

We are, therefore, naturally led to the inquiry, Has he done so?

This Court will take judicial notice of the rules and

regulations made by the Land Department regarding the sale or exchange of public lands.

Caha v. U. S., 152 U. S. 211.

It appears from the transcript of record, in the cases at bar, that such rules and regulations were made by the General Land Office very shortly after the passage of the Timber and Stone Act, requiring the aforesaid character of testimony to be given by the applicant, under oath, at the time of his making final proof. The rules and regulations required this evidence to be given in the form of "depositions". It was so given by many of the applicants, in the cases at bar, who were suborned by the defendants to commit perjury, and the indictment charges that some of the false swearing was to be done by the applicants in such "depositions" at the time of their making final proof.

Does false swearing by the applicant in his deposition at the time of making final proof constitute perjury, under Section 5392, Revised Statutes of the United States; provided the false swearing is in regard to the aforesaid matters and things, which the applicant is required to testify about under said rules and regulations of the General Land Office?

If we are right in our contention as to the policy of the Timber and Stone Act, the aforesaid rules and regulations of the Land Department are reasonable, and are well calculated to carry into effect the intent and true meaning of the Act of Congress.

In the case of *Cosmos Exploration Co. v. Gray Eagle Oil Co.,* 112 Fed. Rep., at pages 11 and 12, this Court said:

> "The Commissioner of the General Land Office has authority to make regulations respecting the disposal of the public lands, and such regulations, when not repugnant to the acts of Congress, have the force and effect of laws. The regulations of the Commissioner relative to lieu land selections under the act of June 4, 1897 (prescribed June 30, 1897), are, in our opinion, reasonable, and evidently were intended and are well calculated to carry into effect the intent and true meaning of the act of Congress. They are properly within the limitations of the law for the enforcement of which they were promulgated and should be complied with. *Anchor v. Howe,* (C. C.) 50 Fed. 366; *Iron Co. v. James,* 32 C. C. A. 348, 89 Fed. 811; *Hoover v. Salling,* (C. C.) 102 Fed. 716, 720; *Poppe v. Athearn,* 42 Cal. 606, 609; *Chapman v. Quinn,* 56 Cal. 266, 273."

This case was affirmed by the Supreme Court of the United States in *Cosmos Exploration Co. v. Gray Eagle Co.,* 190 U. S. 301, decided May 18, 1903.

Hence, it necessarily follows that the law of the United States, to wit: the Timber and Stone Act, coupled with said rules and regulations of the General Land Office, which have the force and effect of laws, authorizes an oath to be administered to an applicant for timber lands at the time he is making final proof, in accordance with the aforesaid rules and regulations, and if he swears falesly in his deposition so taken at said time, in relation to

material matters and things about which he is required to testify, by the provision of said Timber and Stone Act and the aforesaid rules and regulations so made to affect the objections thereof, he is guilty of perjury, under section 5392 Revised Statutes of United States.

It is contended by defendants that such false swearing can not constitute perjury, because Congress can not delegate to the General Land Office the power to create crimes by its rules and regulations, or in any other manner. This is clearly begging the question. The rules and regulations of the Land Department do not create any crime. The applicant to purchase lands under the Timber and Stone Act, is not compelled to testify falsely or at all, at the time he is called upon by the Land Department to make final proof. If he cannot testify truthfully at that time "that he does not apply to " purchase the land on speculation, but in good faith " to appropriate it to his own exclusive use and " benefit, and that he has not, directly or indirectly, " made any agreement or contract, in any way or " manner, with any person or persons whatsoever, " by which the title which he might acquire from the " United States should inure, in whole or in part, " to the benefit of any person except himself", it is his plain duty to either abandon his application to purchase the land, or testify truthfully as to these facts, and contest the right of the Land Department to refuse to permit him to, nevertheless, purchase the land, or to absolutely refuse to testify at all upon

these questions on the ground that the Timber and Stone Act does not require him to do so, and does not authorize the Land Department to make rules and regulations requiring him to do so. The applicant can choose any one of these three courses to suit himself. If he chooses, however, to comply with the requirements of the rules and regulations of the Land Department, and to testify in regard to these questions, he cannot swear falsely as to these facts, and thereafter excuse himself upon the ground that the Land Department had no authority to require him to testify upon that subject. The rules and regulations of the Land Department do not create the crime of perjury, but they do furnish the place and opportunity for the commission of the crime by the applicant, if he wilfully and corruptly desires to swear falsely as to these matters and things.

In the early case of *United States v. Bailey,* 9 Peters, 238, the Supreme Court, speaking through the learned Justice Story, said:

> "This perjury was not merely a wrong against that tribunal or a violation of its rules or requirements; the tribunal and the contest only furnished the opportunity and the occasion for the crime, which was a crime defined in and denounced by the Statute."

In that case the defendant was indicted for making a false affidavit before a justice of the peace of the Commonwealth of Kentucky in support of a claim against the United States. It was contended that the justice of the peace, and officer of the State,

had no authority under the acts of Congress to administer oaths, and that, therefore, perjury could not be laid in respect to a false affidavit before such officer. It appeared, however, that the Secretary of the Treasury had established, as a regulation for the government of his Department and its officers in their action upon claims, that affidavits taken before any justice of the peace of any of the States should be received and considered in support of such claims. And upon the strength of this regulation the conviction of perjury was sustained, Mr. Justice McLean alone dissenting. It was held that the Secretary had power to establish the regulation, and that the effect of it was to make the false affidavit before the justice of the peace perjury within the scope of the statute, and this, notwithstanding the fact that such justice of the peace was not an officer of the United States. The case at bar is, of course, much stronger.

The case of *U. S. v. Bailey,* was quoted and approved by the Supreme Court of the United States, in the case of *Caha v. United States*, 152 U. S. 219, and the opinion of the Court was delivered by Mr. Justice Brewer. In rendering the opinion, the Court not only approved and adopted the law, as stated in the case of *U. S. v. Bailey,* but expressly reviewed the case of *U. S. v. Eaton,* 144 U. S. 677, and pointed out the fact that there is not anything in it conflicting with the views expressed in *U. S. v. Bailey*, and in *Caha v. United States.*

In the two last mentioned cases, the regulation of the Department merely "furnished the opportunity " and the occasion for the crime, which was a crime " defined in and denounced by the statute". Whereas, in the case of *U. S. v. Eaton,* the regulations of the Department did not merely furnish the opportunity and the occasion for the crime, which was defined in and denounced by the statute, but on the contrary the regulations of the Department created the crime by making it the duty of certain persons to keep certain books and by making it an offense not to do so. In that case a person could commit the alleged offense without any affirmative or wilful or corrupt act upon his own part.

In referring to the *Eaton* case, the Supreme Court, in *Caha v. United States,* at page 220, said:

> "This, it will be observed, is very different from the case at bar, where no violation is charged of any regulation made by the department. All that can be said is that a place and an occasion and an opportunity were provided by the regulations of the department, at which the defendant committed the crime of perjury in violation of section 5392. We have no doubt that false swearing in a land contest before the local land office in respect to a homestead entry is perjury within the scope of said section."

Yet the statute did not expressly authorize a land contest before the Local Land Office in respect to a homestead entry.

The same principle was applied by the Supreme Court, speaking through Chief Justice Fuller, in the case of *In re Kollock,* 165 U. S. at page 533.

In that case, Kollock was convicted as a retail dealer in oleomargarine of knowingly selling and delivering one-half pound of that commodity, which was not packed in a wooden or paper package bearing thereon any or either of the marks or characters provided for by the *regulations* and set forth in the indictment. It was conceded that the stamps, marks and brands were *prescribed by the regulations,* and it was not denied that Kollock had the knowledge, or the means of knowledge, of such stamps, marks and brands. But it was argued that the statute was invalid because it does not define what act done or omitted to be done shall constitute a criminal offense, and delegates the power to determine what acts shall be criminal by leaving the stamps, marks and brands to be defined by the Commissioner. The Supreme Court said:

> "We agree that the courts of the United States, in determining what constitutes an offense against the United States, must resort to the statutes of the United States, enacted in pursuance of the Constitution. But here the law required the packages to be marked and branded; prohibited the sale of packages that were not; and prescribed the punishment for sales in violation of its provisions; while the regulations simply described the particular marks, stamps and brands to be used. The criminal offense is fully and completely defined by the act and the designation by the Commissioner of the particular marks and brands to be used was a mere matter of detail. The regulation was in execution of, or supplementary to, but not in conflict with, the law itself, and was specifically authorized thereby in effectuation of the legis-

> lation which created the offense. We think the act not open to the objection urged, and that it is disposed of by previous decisions. United States v. Bailey, 9 Pet. 238; United States v. Eaton, 144 U. S. 677; Caha v. United States, 152 U. S. 211."

In the same opinion the Court approves what was said of the *Bailey* case and in the *Caha* case, and likewise approves the *Eaton* case as being consistent with both the *Bailey* case and the *Caha* case. It points out the distinction between the *Eaton* case and the *Kollock* case, as well as between the *Eaton* case and the *Bailey* case and *Caha* case.

In the *Eaton* case it was held that the mere "neglect" to do a thing required by a regulation made by the President or a Department could not be made a criminal offense where the statute did not distinctly make the "neglect" in question a criminal offense. The Supreme Court pointed out the obvious fact that the mere "neglect" to do something required by a regulation of the Department was a far different matter than is a case where no violation of the regulation is charged, and where on the contrary the party committed the offense by complying with the regulation and in violating an express statute defining his crime while doing so.

In the case at bar the defendants are not charged with having violated any regulation of the General Land Office. On the contrary, they conspired to induce a large number of persons to comply with the regulations of the General Land Office by testifying

at the time of making final proof, fully and completely, to all questions which are required by said regulations to be asked of them. While complying with those regulations, however, the applicants were to violate an express statute, to wit: Section 5392 of the Revised Statutes of the United States, by testifying falsely in answer to the questions propounded to them under the regulations of the Department, for the purpose of effecting the object of the Timber and Stone Act to prevent any one person from purchasing more than one hundred and sixty acres of timber land from the Government, and to prevent any person from acting for another in making such purchases.

The case of *Ralph v. United States,* 9 Federal Reporter 693, is also instructive. In that case a regulation of the Treasury Department required that an affidavit of the surety upon a certain character of bond should be made before some officer qualified to administer an oath, signed by the surety, and setting forth his pecuniary responsibility. Such an affidavit was signed by the defendant before a proper officer, and he was indicted for perjury, on account of the false statements contained therein. On the trial of the case before the District Court, the affidavit was offered in evidence, and objection was made on the ground that it was not an instrument required by law to be sworn to, and therefore, a false statement contained therein did not constitute perjury. Upon appeal, the Circuit Court, in construing the action of

the District Court, in passing upon a motion for new trial, said:

> "It is claimed by the plaintiff in error that his rights were sacrificed by the action of his counsel in the district court. Of that the district court was a competent judge, and it is to be observed that the counsel himself, who acted for the plaintiff in error in the district court, was not heard, and his affidavit was not taken, and therefore his statement of the facts, and of the circumstances which operated upon him, is not before us. He is said to have relied upon a view which he took of the law of the case which he thought conclusive, namely, that there was no statute which required an affidavit of the kind which is the subject of controversy in this case. If that were so, then it was a misapprehension, we think, of the law which declares that certain officers of the treasury department, as well as the secretary himself, may make certain rules and regulations relating to the duties of their several offices. There can be no doubt it was competent for a regulation of the kind in controversy here to be made by the proper officer of the treasury, namely, that before a bond should be accepted, which might authorize the delivery under the law then in force, of stamps on credit to a manufacturer of matches, an affidavit should be made showing the responsibility of the sureties, and therefore this was an affidavit authorized by law; and if the statements contained in it were false, and known to be so by the person making them, then upon it perjury could be assigned. The judgment and sentence of the district court will be affirmed."

The case of *United States v. Hearing,* 26 Federal Reporter, at page 744, is also instructive. In that

case, the opinion was written by Deady, Judge. In that case, Judge Deady said:

> "The oath of the applicant to the affidavit or the excusatory facts is not compulsory. But whoever wishes to have the benefit of the homestead act must show in some way the existence of the facts which entitle him thereto; and these, when not of record, being within the applicant's knowledge, may be shown by his own oath. As to the facts showing the qualification of the applicant and his purpose in making the entry, the statute expressly permits and requires them to be proven by his oath; and if there were no specific direction in the statute on the subject, I think he would be allowed to do so as a matter of course. And this is the condition of the statute in regard to these excusatory facts. The mode of their proof is not prescribed, and convenience, usage and necessity all point to the oath of the party as the proper evidence of their existence. *Certainly it would be within the power of the department to make a regulation on the subject, permitting or prescribing this mode of proof in such a case.*"

Judge Deady, after discussing the *Bailey* case, approvingly, further says:

> "So here, the statute not having prescribed the mode of proving the excusatory or preliminary facts, a regulation of the department might direct or permit that it be done by some such recognized mode of proceeding as the oath of the applicant, and thereupon such oath when taken is administered, in effect, under or in pursuance of a law of the United States, and therefore perjury may be assigned thereon. Whether such a regulation exists or not is a matter within the judicial knowledge of the court; that is, it is a matter about which the court may inform itself."

And in the same case, Judge Deady further says:

> "If the defendant was sworn to the affidavit set out in the complaint, before the clerk, and the same was false to his knowledge in any one of the particulars alleged, an indictment for perjury may be maintained thereon."

In the case of *Prather v. United States,* 9 Appeal Cases, District of Columbia, 82, the Court of Appeals, in passing on one of the oleomargarine cases, at page 87, said:

> "The constitutionality of Section 6 of the Statute is called in question, on the ground that is does not itself completely define and declare any offense against the United States; that it leaves it to the Commissioner of Internal Revenue and the Secretary of the Treasury to determine by their regulation what shall constitute a criminal offense against the United States, inasmuch as they are to determine the stamp or marking, the omission or falsification of which constitutes the offense, as it is claimed; and that this is a delegation of legislative power which it is incompetent for Congress under the Constitution to attempt. * * *
>
> "But we do not think that the criminal liability in the present instance is the creation or the result of departmental or official regulation. It seems rather to fall into the category of offenses indicated in the case of Caha v. United States, supra, in which Congress has fully declared the offense, and departmental regulation has merely afforded the opportunity for its commission."

In the case of *United States v. Dastervignes,* 118 Federal Reporter, 199, the Circuit Court, for the Northern District of California, by Beatty, District

Judge, in discussing a question similar to the one at bar, said:

> "It is not doubted that a legislative body cannot delegate its authority to others to make laws; but that it may authorize the formulation of rules to enforce its laws, not simply according to their letter, but to the full extent of their spirit and object, has been too long held to be now doubted. To this should be added that such laws and the rules in pursuance thereof should not be strictly construed against the government, but liberally in its favor. The Government is but the people en masse. Its laws are their laws, in which all are alike interested, and to the defense of which none are individually called. Strict construction might soon, with only such defense as the general public would give, result in such enervation as to render them valueless. Upon the same principle that laches is not imputed to the Government, a liberal construction of the laws in its favor should follow.
>
> "In this case the authority is expressly stated to be for the purpose of securing the objects of such reservations, and then enumerates as one of such objects the regulation of their occupancy and use. The simple test to be applied to this case is the one before referred to: Is it authority to make a law or to enforce one already made? A brief examination of a few of the authorities will aid to a reply; and such examination is pertinent, because of the fact that two of the District Courts have held, in criminal cases, these rules invalid. Before doing so, however, it is suggested that in many matters concerning which Congress is called upon to legislate, and especially in those which are largely under the management of some chief department of the Government, it is impossible that all the minutiae for the enforcement of such laws can be foreseen and provided

> for by special provisions. Necessarily much must be left to the executive officer. Congress indicates the objects it has in view. It embodies in general terms the matters to be accomplished and aims to be reached, and leaves the duty of enforcement to the proper executive officer. Hence the necessity, as has been the practice from the institution of the Government, of authorizing such officers to make the proper rule for the enforcement of the law."

The regulations of the General Land Office, in the cases at bar, were made for the purpose of effectuating the policy, intent and purpose of the Timber and Stone Act, and they are authorized by the Act itself in the language heretofore quoted from Section 3 thereof, that "effect shall be given to the foregoing " provisions of this Act by regulations to be pre- " scribed by the Commissioner of the General Land " Office".

Regulations in question are not repugnant to the acts of Congress, and they are reasonable and well calculated to carry into effect the intent and true meaning of the Timber and Stone Act, and consequently they "have the force and effect of laws", as this Court said in the case of *Cosmos Exploration Company v. Gray Eagle Oil Company,* 112 Fed. Rep. at page 11.

We respectfully submit, therefore, that the trial court did not err in holding that the Government was entitled to prove, under this indictment, that the defendants conspired to induce and suborn certain of the entrymen to commit perjury in their final

proofs, by falsely swearing that they had made no contract or agreement to sell the land at any time prior to the making of such final proof.

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United States Attorney for the District of Oregon,
Attorneys for the Defendant in Error.

3

NO. 1369

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

VAN GESNER,
Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

MARION R. BIGGS,
Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

JOHN NEWTON WILLIAMSON,
Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

REPLY BRIEF OF PLAINTIFFS IN ERROR.

FRANCIS J. HENEY, Special Assistant to the Attorney General,
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A. S. BENNETT,
H. S. WILSON and
B. S. HUNTINGTON.
Attorneys for Plaintiffs in Error.

Filed this..... day of February, A. D. 1907.
FRANK D. MONCKTON, Clerk,

By ..... Deputy Clerk.

FILED
FEB 28 1907

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REPLY BRIEF OF PLAINTIFFS IN ERROR.

The Defendant in Error has served upon us a brief in this cause and also what is called a supplemental brief.

In this reply brief we shall discuss the questions presented in both.

It is claimed by defendant in error that the writ in this case as to Williamson should be dismissed on the ground that a previous writ had been taken to the Supreme Court of the United States, but this contention is based upon a misconception of the law—an assumption that where a party takes a writ of error to the United States Supreme Court on constitutional grounds that those constitutional grounds *alone* are presented to that court. But this is not true, as will be seen by an examination of the Burton case. On the contrary, if the court takes jurisdiction att all it passes *upon all the questions involved, whether constitutional or otherwise.* Indeed, it will not pass upon the constitutional question at all if there are any other grounds upon which the case may be decided.

Burton vs. United States, 196 U. S. 283.

The writ of error to this court was not taken with the idea of having *both* courts pass upon the merits. Of course we concede that we are not entitled to a decision of this court if the previous writ to the Supreme Court in the Williamson Case was properly taken. But, it is equally plain and true that if the Supreme Court has *no jurisdiction*, then that writ of error was *null and void* and this one stands. At the time the writ of error was taken ot the Supreme Court of the United States it was a doubtful question with the attorneys for plaintiff in error, as to whether or not the Supreme Court would apply the doctrine of the Burton Case (in which the constitutional question was then still undecided and open), to a case like this, there being some room for distinction between the two, and we did not feel that we ought to lose our rights altogether to have our contentions upon the merits

passed upon by this court, if the Supreme Court should hold the writ of error to that court, *void upon jurisdictional grounds.*

We supposed that the writ of error would come up first in the United States Supreme Court or at least that the question would remain in statu quo until the jurisdictional questions would be passed upon by that Court and that then, if the Supreme Court held that it had jurisdiction they would proceed to pass upon the merits and the writ of this Court in the Williamson Case could be dismissed, as it would then be void and ineffectual. But if, on the other hand, the Supreme Court should hold that writ of error, void and of no effect, then the writ tothis court would be valid and the merits of the case could be passed upon here

INDICTMENT NOT SUFFICIENT.

In the brief of the defendant in error it is argued that the demurrer to the indictment and the motion made in arrest of judgment are not sufficient to raise all of the questions discussed in the brief of plaintiffs in error.

Plaintiff in error, Williamson, demurred to the indictment, and this demurrer by stipulation was to stand for each and all of the defendants, and is as follows, omitting the caption, transcript of record p. 39-40.

> "Comes now the above-named defendant, John Newton Williamson, in person and by H. S. Wilson and A. S. Bennett, his attorneys, and demurs to the indictment in the above-entitled cause, and says:
>
> "That said indictment, and the matters and facts therein contained in manner and form as the same are stated, are not sufficient in law and are not sufficient to constitute a crime, and that said indictment is not direct and certain as to the crime charged, or the particular circumstances of the crime. And that it does not set forth the name or iden-

tity of the persons defendants are charged with having conspired to suborn, and does not describe or identify the perjury which is alleged to have been suborned, instigated and procured, or the land as to which such perjury was to be committed. And that the said John Newton Williamson is not bound by the law of the land to answer said indictment, and this he is ready to verify.

"Wherefore, for want of a sufficient indictment in this behalf, the said John Newton Williamson prays judgment as to the same, and prays that the same be quashed and adjudged insufficient, and that he may be dismissed and discharged from answering the same."

Defendant's motion in arrest of judgment, see p. 79-80 transcript of record, omitting caption is as follows:

"Comes now the above-named defendant, Van Gesner, for himself by his attorneys, Bennett & Sinnott and Huntington & Wilson, and moves the Court that judgment in the above-entitled cause be arrested as against him for the following reasons:

"First. Error appearing on the face of the record excepted to by said defendant.

"Second. Error committed by the Court and excepted to by the defendant in sustaining objections to the several pleas in abatement filed herein, and in dismissing said pleas and in dismissing said pleas in abatement.

"Third. Error committed by the Court to which the defendant excepted in overruling defendant's demurrer to the indictment herein.

"Fourth. For the reason that the indictment herein does not state a crime in that, among other things, it does not sufficiently, or at all, allege that this defendant, or any of the said defendants, at the time of the alleged conspiracy, or at all, knew that the matter to be sworn to by the persons alleged to be suborned would be false, or that the defendants or either of them then knew that the persons suborned, or any of them, would know their statements to be false at the time they were made or that the defendants knew or believed that the persons to be suborned, or any of them would knowingly or willfully, or corruptly take a false oath in reference to the matters alleged in the indictment or at all.

"Fifth. That said indictment is so uncertain that it does not state a crime, and for each and all of the reasons assigned in said defendant's demurrer on file herein."

Under the common law a general demurrer is sufficient to raise each and every question argued by plaintiffs in error. We cite Bishop's New Criminal Procedure, Volume 1, Sec. 777, wherein it is said: "If a demurrer does not undertake to particularize defects it is termed a general demurrer, if it does a special. While duplicity may perhaps at the common law require a special demurrer, and possibly some other imperfections may also, in most circumstances where no statute intervenes, a defect can be reached as well by general demurrer as by special and the two differ only in form."

While there is a statute which provides the form of a demurrer in civil proceedings in the Federal Courts there is none concerning demurrers in criminal proceedings; hence no statute intervenes and the practice being according to the common law a general demurrer is sufficient.

However, it will be observed from the above demurrer that it is both general and special.

Defective description of the offense is not one of the points in which an indictment is cured by a verdict, but the same is equally fatal in a motion in arrest of judgment as upon demurrer or a motion to quash.

See note No. 2, Sec. 759, Wharton's Criminal Pleading and Practice, 8th Ed.

The only defect which cannot be taken advantage of in a motion in arrest are errors as to form, not going to the description of the offense. The errors set forth in the motion in arrest

of judgment are not unimportant and they are of a character that can be urged for the first time even after verdict. If the indictment is defective in the particulars mentioned in the motion it does not state an offense.

In the case of Harry F. Bacheldor vs. United States, 156 U.S. 426 (Law. Ed. 39, p. 478) the defendant moved in arrest of judgment because the count upon which he was convicted did not "state a public offense against the laws of the United States." The Court held that the words "willfully misapplies" in an indictment under Revised Statute Sec. 5209 are not sufficiently descriptive of the exact offense intended to be punished without further averments showing how the misapplication was made and that it was an unlawful one. The Court said on page 429:

> "By the settled rules of criminal pleading and by the previous decisions of this Court the words 'willfully misapplies,' having no settled technical meaning * * * * do not of themselves fully and clearly set forth every element necessary to constitute the offense intended to be punished; but they must be supplemented by further averments showing how the misapplication was made and that it was an unlawful one. Without such averment there is no sufficient description of the exact offense with which the defendant is charged, etc."

A contention is made in the brief of the defendant in error to the effect that the same certainty and strictness are not required in an indictment attempting to charge a conspiracy as in other cases. The rule is stated in several of the cases cited by plaintiffs in error in their first brief, and we again call the Court's attention to the law as therein announced.

In the case of Pettibone et al, plaintiffs in error, vs. United States, 148 U. S. 197; 37 Law. Ed. 418, Mr. Chief Justice Fuller, speaking for the Court, says on page 203:

> "The general rule in refercnee to an indictment is that all the material facts and circumstances embraced in the definition of the offense must be stated, and that if any essential element of the crime is omitted such omission cannot be supplied by intendment or implication, the charge must be made directly and not inferentially or by way of recital." The Chief Justice further says on the same page:
>
> "And the rule is accepted as laid down by Chief Justice Shaw in Com. vs. Hunt, 4 Met. 111, that when the criminality of a conspiracy consists in an unlawful agreement of two or more persons to compass or promote some criminal or illegal purpose that purpose must be fully and clearly stated in the indictment; while if the criminality of the offense consists in the agreement to accomplish a purpose not in itself criminal or unlawful, by criminal or unlawful means, the means must be set out."

The above rule was announced by the Supreme Court of the United States in construing an indictment charging a conspiracy to commit an offense against the United States under Sec. 5440, and it undoubtedly applies to the case under discussion.

An indictment charging conspiracies to cheat or defraud have sometimes been held sufficient although very general in their terms. The courts have gone further in holding good indictments charging conspiracies to cheat and defraud than in any

other class of cases. It is said in the Encyclopedia of Pleading and Practice, Volume 4, page 724, that:

> "According to the English practice as gathered from the decisions it is not necessary to set out the contemplated means for effecting the cheat, but a general charge is sufficient." It is further said:
>
> "The English practice just stated has been followed in some of the American courts; but such practice has been regarded as very loose and informal, and the better rule seems to be that the indictment should set out the unlawful means intended to be used, since the words "cheating and defrauding" do not *ex vi termini* import anything unlawful, and it becomes necessary for the court to see that the intended means are in fact illegal."

The United States Supreme Court has not adopted the rule that an indictment attempting to charge a conspiracy is to be construed with any less strictness or that it may be less certain than indictments in ordinary criminal cases.

Of course, the indictment does not charge the conspiracy as being more definite than the unlawful agreement was in fact. But in order to constitute a criminal conspiracy to commit an offense against the United States the minds of the conspirators must have met upon some scheme which contemplated the doing of all the elements that go to make up some statutory offense, or else there is no criminal conspiracy; and if there is any "essential element of the crime omitted it cannot be supplied by intendment or implication." "The charge must be made directly and not inferentially or by way of recital, and when the criminality of a conspiracy consists in an unlawful agreement to promote some criminal purpose that purpose must be fully and clearly stated in the indictment." Thus does the Supreme Court apply the general rule touching indictments to indictments

charging conspiracy to commit an offense against the United States.

THE MEANING OF THE WORD WILLFUL AS USED IN THE SECTION OF THE REVISED STATUTES DEFINING PERJURY.

JudgeToulmin says in United States vs. Edwards, 43 Fed. Rep. at page 67:

> "That willfully means with design, with some degree of deliberation. To say that testimony was corrupt is to say that it was wicked or vicious, whereas to say that it was willful is to aver that it was given with some degree of deliberation; that it was not due to surprise, inadvertence or mistake, but to design. The statute uses the word 'willfully' and makes it the essence of the offense."

It is also said on the same page:

> "That perjury cannot be committed unless the person taking the oath not only swears to what is false or what he does not believe to be true, but does so willfully. Rash or reckless statements on oath are not perjury, but the oath must be willfully corrupt."

In the case last cited the indictment was held insufficient in that it did not allege that the false oath was taken willfully, and that an allegation that it was corruptly taken did not embrace the element of willfullness.

In the case of Spurr vs. United States, 174 U. S. 734, Mr. Chief Justice Fuller says:

> "The word 'willfully,' says Chief Justice Shaw, in the ordinary sense in which it was used in the statute means not merely voluntarily but with a bad purpose."

He further says on the same page:

"The significance of the word 'willful' in criminal statutes has been considered by this Court. In Felton vs. United States, 96 U. S. 699, it was said doing or omitting to do a thing knowingly and willfully, implies with a bad intent to do it or to omit doing it."

In Potter vs. United States, Mr. Justice Brewer, speaking for the Court says, 155, U. S. 446:

"The word 'willful' is omitted from the description of offenses in the latter part of this section. Its presence in the first cannot be regarded as mere surplusage; it means something. It implies on the part of the officer knowledge and purpose to do wrong."

In United States against Howard 132 Fed. (same case cited by defendant in error), on page 326, part of the syllabus, it is said:

"And while in an indictment for subornation of perjury caghrnini p.cood ebu taia mote rtvesf ws cmfwy shrdl under Sec. 5392, the omission of the identical word 'willful' in charging a false swearing by the witness may not be fatal, the indictment in such case must contain equivalent words, themselves free from ambiguity or equivocation. Such requirement is not met by an averment that the defendant knew at the time of the subornation that the testimony to be given by the witness was false, willful and contrary to the oath to be taken by the witness, which relates to the knowledge of the defendant and not to the state of mind of the witness."

In the case of United States against Edwards, supra, Judge Toulmin says, 43 Fed. 67:

"The statute uses the word willfully and makes it of the essence of the offense."

Again on the same page:

> "The Court being of the opinion that willfullness is an essential ingredient for the offense of perjury under Sec. 5392, Revised Statutes, it must be charged in the indictment, or the indictment will be bad."

It may be the law that the use of the word "wilful" is not absolutely necessary in a case of this kind, but if so, words of like meaning must be used so that the indictment, without ambiguity or equivocation means the same as it would have meant if the word "wilful" had been used. We submit that there is no allegation in the indictment under consideration to the effect that the plaintiffs in error intended, as a part of the conspiracy charged, that any one should wilfully take a false oath. Neither are there any words in the indictment that are the equivalent of a charge of this kind.

Defendant in error proceeds on the theory that it is charged in the indictment that the plaintiffs in error agreed together that they would procure other persons to make contracts with them to transfer to them any title that such other persons might acquire to lands under the timber and stone act, and then to take an oath before some competent tribunal that they had not done so; even then we think the indictment would fall short of charging a conspiracy to procure wilful false swearing. But in this case the indictment does not charge that the conspiracy contemplated or that it was a part of the conspiracy that any contract of the kind mentioned was to be entered into. It is said in the indictment, see page 11 of the transcript:

> "When in truth and in fact as each of the said persons would then well know and as they, the said John Newton Williamson, Van Gesner and Marion R. Biggs, would then well know such persons would be applying to purchase such

lands on speculation, and not in good faith, to appropriate such lands to their own exclusive use and benefit, and would have made agreements and contracts with them, the said John Newton Williamson, Van Gesner and Marion R. Biggs, by which the titles they might acquire from the said United States in such lands would inure to the benefit of the said John Newton Williamson and Van Gesner."

It is to be observed that ther is no direct allegation anywhere that contracts of the nature indicated would be entered into, but the allegation is made that the defendants would know and the persons who are to be suborned, according to the allegations of the indictment, would know that such agreements had been made at the time such persons were applying to purchase the land.

There is not a hint in this indictment that at the time the alleged conspiracy was formed anybody contemplated the making of such agreement. In the brief of defendant in error it is said on page 10 that the allegation in the indictment is that the defendants then well knew that they would be applying to purchase such lands on speculation and not in good faith to appropriate such lands to their own exclusive use and benefit respectively. There is no such allegation in the indictment. The allegation is that the defendants would then well know, referring to a future time and not to the time of the formation of the conspiracy Neither is it charged that the defendants agreed among themselve that they would procure persons to take the oath referred to knowing at the time of the conspiracy and as a part of it that such oath would be false, or knowing that any contract was to be made.

We call the court's attention to our opening argument on this subject and we submit that the answer of defendant in error does not meet the objections we have raised.

In order that the argument of defendant in error have any point at all it must appear that the conspiracy contemplated the making of the contract referred to, when in truth and in fact the conspiracy as alleged contemplates no such thing. It will not do to overlook the doctrine laid down in the case of the United States against Peuschel, 116 Fed. Rep. 642. This case was referred to by us in our opening brief, and holds:

> "That to constitute a criminal conspiracy to defraud the United States by obtaining title and possession through homestead entry to mineral lands not subject to entry, the fact that the land contained valuable minerals and knowledge of such fact by the conspirators at the time the conspiracy was formed are essential and must be averred in the indictment. An indictment which after charging such conspiracy and the subsequent making of an affidavit, and the filing of an application for entry in furtherance thereof, avers that the defendants then and there well knew that the land contained valuable mineral deposits, is uncertain and fatally defective, in failing to charge such knowledge at the time the conspiracy was formed."

It is manifest that if the indictment was bad in the Peuschel case it cannot be held good in the case under discussion. As it is clear from this indictment that no knowledge is attributed to the defendants of the making of contracts except knowledge at the time when the applicants would be applying to enter. This point is of a like nature as the one urged in our opening brief, and we respectfully ask the attention of the court to that discussion. We do not wish to repeat our first brief, neither do we want the court to overlook it, especially concerning those matters which are not answered at all by the brief of the defendant in error.

There is no allegation that a conspiracy existed which contemplated the making of the contracts of the kind alleged in the indictment.

There is no allegations that such contracts were made. It is stated that applicants and plaintiffs in error would know that such contracts would have been made.

A statement that defendant and applicants would not believe certain matters to be true.

No allegation that defendants knew of the state of mind of applicants as to what their belief was or would be.

Defendants must be held to understand the charge only as it is unequivocally made in the indictment.

Counsel for defendant in error seem to think that plaintiffs in error should first advise themselves of what constitutes the essential elements of the crime of conspiracy to suborn perjury, then assume that the person drawing the indictment knew the law, and therefore must have intended to charge all the necessary elements, and if he did not, supply the omission themselves, and therefore not be mislead or surprised if at the trial an attempt is made to supply omissions by proof of essential elements of the offense sought to be charged but omitted. While it may not be true in fact it is at least theoretically true that the pleader is confined in his statement of fact to what the grand jury may find to be probably true and is not at liberty to insert in the indictment essential facts not found by the grand jury.

The errors complained of are errors of substance and not of form. Insufficient description and identification of the offense sought to be charged, defects which are fatal.

Defendant in error cites two cases on the omission of the word willful and these are considered later on in this brief and two cases on the use of the word "knowingly" in an indict-

ment, namely, Rosen vs. United States, 161 U. S. 33, and U. S. vs. Clark, 37 Fed. 107. While the question of the sufficiency of the indictment is considered in one portion of the argument and the omission of the word "willful" in another portion it is impossible to keep the two points separate as they are essentially one and the same.

In both of the last mentioned cases, the question was whether an indictment, under Section 3893 of the Revised Statutes, charging that defendant knowingly deposited for mailing certain obscene matter, sufficiently charged that defendant knew the matter to be obscene. In both cases the question arose on motion in arrest of judgment and in each case the indictment charges the offense in the language of the statute.

Of course, it is not conclusive that the indictment is good because the statutory language is used but as said by Justice Brewer in delivering the opinion in the Clark case, page 106:

> "There is always a presumption that the language of the statute fully describes the offense intended to be punished, and consequently that an indictment using that language also fully describes the offense."

In both cases the indictment alleged the obscene character of the matter deposited for mailing, and, in the Rosen case particularly, described it fully. In these two cases the words of the statutes describing the offense were used.

In the case now being argued the statutory word constituting the gist of the offense is omitted. In so far as the two cases may be thought to bear upon this case it may be said that it is one thing to charge a man with knowingly doing something and entirely a different matter to charge persons with conspiracy to subborn perjury and neglect to say that they conspired to have

the persons to be suborned take a *willful* false oath concerning matters which they did not believe to be true; and ask the Court to draw such inferences, as would make the indictment good, from the fact that it is alleged that the defendants and the several applicants mentioned in the indictment would in the future know that certain contracts would have been made and that defendants and the several applicants mentioned would in the future not believe certain matters to be true.

There is no allegation that the defendants at any time would know the state of mind of the applicants, but we are asked to infer such knowledge from the allegation that defendants and applicants would at some time know that they would have made certain contracts without a direct allegation that the contracts were made. This is an attempt, we submit, to draw inferences from inferences, and pile intendment upon intendment, and at last not getting even an inference that the alleged conspiracy contemplated even the foundation of the inference. Again, the question is not what would be the future state of mind either of defendants or of the several applicants, but what did the defendants at the time of the formation of the conspiracy and as a part of it intend, and this is what must be charged in the indictment, and we insist that it is not charged at all.

It is obvious that under our contention the substantial rights of the plaintiffs in error have been prejudiced by the rulings of the Court.

The other cases cited by the defendant in error are of little, if any, value, in passing upon this case. For illustration, in the case of Connors vs. United States, the Court simply held that a motion in arrest of judgment could not be relied upon to raise the question that more than one offense was stated in a single count, when the ruling did not result prejudicially to the defendant, and it was further held that the indictment charged only the single offense in the count complained of.

We pass to a discussion of the question of whether or not the absence of the word "wilful" from the indictment is fatal on the theory assumed by council for defendant in error, that the indictment charges a conspiracy to procure persons to make contracts and agreements whereby the titles which they might acquire from the United States should inure to the benefit of persons other than themselves; and that such conspiracy further contemplated that such persons should swear that they had not made such contracts.

We do not waive the position first taken by us with reference to that point, and insist strenuously that the indictment does not charge a conspiracy to have any contracts made, etc., as set out in an earlier part of our brief. If our first position is correct, of course, the indictment is bad, but if this Court should hold otherwise we still insist that the absence of the word "wilful" is fatal to the indictment. The defendant in error has cited two cases only which he claims are direct authority on the point that equivalent words may be used for the word wilful. The first case cited, Babcock vs. United States, 34 Fed. 873, is not authority for the proposition advanced. The precise point raised, in the language of Justice Brewer, is as follows (see page 876):

> "It is insisted that in no count of the indicement is it alleged that the defendant knew or believed that the parties or any of them would swear to the facts charged to be false."

The portion of the indictment quoted does not contain the word "wilful." Whether it was in the indictment or not is not fully shown by the case. Mr. Justice Brewer passes upon the question raised, namely, did defendant know or believe that the parties or any of them would swear to the facts charged to be false. In holding that this contention is not well taken it is said on the same page:

> "Take the first count for instance. It charges that the defendant did solicit, suborn and procure an unknown person assuming and pretending to be Mary L. Pratt, who then and there took an oath administered by the register; she, the said person, not believing the same to be true as he, the said defendant, then and there well knew; and that she did take the oath signed and subscribed the affidavit, not believing it to be true, all of which he well knew. Then it sets out the substance of the affidavit, and further alleges wherein it was false, and that she at the time knew it was false; and that he, knowing the same, solicited, suborned and procured her to take the oath and sign and subscribe the affidavit, well knowing the same to be untrue, and well knowing that the person falsely impersonating Mary L. Pratt well knew the same to be untrue."

It will be noticed that the charge is directly made that the defendant procured and suborned her to make the affidavit. This fully meets the objection that the defendant did not know or believe that the party would swear to the facts charged to be false. It refers to something that he had actually done, something that he had procured to be done and if the specific objection had been made that it did not appear that she wilfully took a false oath if there was ever a case where equivalents could be substituted for the word "wilful" this is one of them. It is an entirely different thing to charge what a man did do and set it out fully from what it is to charge a conspiracy and allege knowledge that might be had by the parties at some indefinite future time, especially when

it does not appear at what time they were to have such knowledge. In the indictment in the case now on trial it is nowhere directly charged that the matter was false.

The other case cited, United States vs. Howard, 132 Fed. 325, does hold, that it is not absolutely necessary to use the word "wilful" in a case of this kind, but it is put in these words on page 351:

> "I am inclined therefore to hold that, notwithstanding the obvious advantage of using the identical word used in the statute it is not absolutely necessary to use the word "wilful," etc."

In this case the judge held, however, the indictment bad for subornation of perjury where it was charged that the defendant knew at the time of the subornation that the testimony to be given by the witness was "false, willwul and contrary to the oath" to be taken by the witness.

It will be noticed that the first of the two cases cited by defendant in error refers to the state of mind of the defendant while in the last case cited it was contended and held the indictment was bad because the word "willful" was not used in describing the state of mind of the person suborned. The case under consideration is nothing like as strong a case in favor of upholding the indictment as the case of United States vs. Howard. It was contended in the United States against Howard that it followed that the oath must be a willful false oath if the defendant knew it was so because he could not know it unless such was the fact. But the Court said, page 351:

> "Now, then, while in these indictments the pleader has been careful enough to aver that Howard knew that the witness Smith, for example, had been suborned to "willfully"

swear contrary to his oath to facts that he did not believe to be true, it is going a long way upon the pathway of indulgence to permit an implication from that averment that Smith himself "willfully swore," contrary to his oath, to that to which he did not believe to be true."

The Court further says on page 349:

"The pleader has omitted this word (willful) when the statute laid open before him, and it was a plain duty, on the authorities, to have used it."

On page 353 the court says:

"For illustration, if, at the time the bargain was made by Howard with Smith for his false testimony, Smith had been, let us say, insane, so that he could not act willfully about anything, and Howard, being ignorant of the fact of insanity, should have made his bargain, in the belief, therefore, that he was acting willfully both in his bargain and would be acting willfully in delivering his testimony,it might well be said in a less rigid and narrow sense, that Howard knew he was acting willfully."

Under these circumstances it is suggested that he would escape conviction. We understand that it was not necessary in the case on trial that perjury should actually have been committed, but it is absolutely necessary to charge that the defendants conspired, and that their conspiracy involved, among other things, the notion that persons should take a willful false oath and their state of mind as to what they intended the person to be suborned should do is not stated with sufficient clearness in the indictment or as we think at all. It is not alleged in the indictment that the defendants at any time did or would know that the applicants would know that the matter that the applicants were to swear to would be false, or that the defendants at any time would know that the applicants would not believe the matter to be sworn to by them would be true.

It is alleged in the indictment, see page 12 of transcript record:

> "That the matters so to be stated, subscribed and sworn to by the said persons being material matters under the circumstances and matters which the said persons so to be suborned, instigated and procured, and the said John Newton Williamson, Van Gesner and Marion R. Biggs would not believe to be true."

It is not here alleged that the defendants would know the state of mind of the several applicants, or they the state of mind of the defendants. It is alleged on the preceding page as follows:

> "As each of the said persons would then well know and as they, the said John Newton Williamson, Van Gesner and Marion R. Biggs, would then well know such persons would be applying to purchase such lands on speculation and not in good faith to appropriate such lands to their own exclusive use and benefit, and would have made agreements and contracts that they, the said John Newton Williamson, Van Gesner and Marion R. Biggs, by which the titles which they might acquire from the said United States in such lands would inure to the benefit of the said John Newton Williamson and Van Gesner, etc."

Now, we are asked to infer that the defendants knew that the applicants were taking a willful false oath and that the defendants knew the state of mind of the applicants because of having made this contract. To refer a moment to our former proposition, this is far from saying that the defendants formed a conspiracy contemplating this, that these contracts should be made.

The indictment merely charges that in the future the defendants would have made contracts and the several applicants would have made contracts not saying this is part of the conspiracy. But passing that question this indictment does not

charge and is not construed to charge that the applicants had made a contract with the defendants in the very words set out in the indictment, but according to the construction given it it chargesthat the defendants would have made a contract with the several applicants, which contract would have the effect set out in the indictment. The witness, Jeff Evans, knew what the talk was between him and the several defendants. He thought, to make an agreement or contract within the meaning of the oath that he took, the agreement must be in writing. (See page 430 of the transcript). The witness, Evans, might not have perhaps believed the affidavit which he signed according to the meaning given it by the counsel for the defandant in error, but according to the interpretation which he placed upon it he did believe it was true. (See transcript 339. 266). Other witnesses understood according to their testimony that they were making application for their own use and benefit so long as they got whatever the understanding was above the cost price, and that they made the application not for the benefit of anyone else but to benefit themselves. (See Transcript of Record, 358.) At the time of the trial of this case witnesses might be convinced that what they had said in their several affidavits were not true according to the interpretation of the technical terms placed upon their affidavits by the government officials. It does not follow that they committed perjury, or that the defendants intended that they should commit perjury. It does not appear that the defendants intended as a part of their conspiracy that the several applicants or any of them should swear willfully or otherwise to anything which they did not believe to be true. As far as these allegations are concerned the defendants might have intended to deceive every one of the applicants and make them believe that the matters to be sworn to by them should be true. They might even intend to make a con

tract with the several applicants and to have the applicants swear that no contract was made and intend as a part of the conspiracy to deceive the applicants and make them think that what they were swearing to was the truth.

We ask the Court, in undertaking to determine what the indictment actually charged, to refer to the transcript of record, and not to the brief of the defendant in error. On page 11 he says:

> "On the contrary it is specifically alleged that before applying for them he entered into an agreement with the defendants that they would apply for them in the manner prescribed by law."

We submit there is no such allegation in the indictment, either specifically or otherwise. Note what is said on page 11 above the portion just quoted. It might be true that if a person made an application to purchase, and entered into a contract by which the title would inure to the benefit of another, and if his sole purpose in applying to purchase the land was to obtain title to it in order to benefit another person and he understanding it should swear to the contrary he very likely would be taking a willful false oath. This is not the case that we have presented. The defendants must have intended to induce the several applicants to willfully swear falsely to matters which they did not believe to be true.

The only place in the whole indictment where by any stretch of the use of language it could be said the defendants intended that the applicants should swear to something which they did not believe to be true is found on page 10 and by thereupon "contrary to such oath stating and subscribing material matters contained in such declarations and depositions which they should not

believe to be true." As suggested in our first brief, "should" means "ought," and nothing more here, and it refers to some time in the future that is utterly vague and uncertain, and it does not appear whether they actually intended they should believe the matters untrue when they took their oath or at some future time,and this allegation, under any construction placed upon the indictment, is not sufficient. We submit that the indictment cannot be said to charge that the defendants intended that the applicants should willfully swear falsely by reason of an allegation in the indictment that the defendants and the several applicants would know at some future time that the applicant would be applying to purchase such lands on speculation, and not in good faith to appropriate such lands to their own exclusive use and benefit respectively, and would have made agreements and contracts, etc.

We wish to say a word concerning the contention made by the defendant in error on pages 32, 33, 34, 35 of the brief of defendant in error. He seeks to avoid the inevitable conclusion that the defendant was surprised by the construction of the indictment, at the last trial, to the effect that it charged that the subornation of perjury was to be committed at the time of final proof as well as at the time of the application to purchase. The fact that there appears to be no objection to the final proof testimony of applicant B. F. Jones is of no importance. Note that it is called final proof testimony so that there is no doubt as to what is meant. Nobody could confuse that with his application to purchase. The plaintiffs in error were not estopped from raising this question if it is a fact that they did not object to the final proof testimony of one claimant. Neither does it follow that their objection to the form of the indictment describing the application to purchase or sworn statement is an admission that

the indictment well charges something else, namely, that perjury was to be suborned at the time of final proof. The word "deposition" in its technical meaning does not describe any testimony used either at the time of final proof or at the time of making the application to purchase. A deposition is a paper to be used in legal proceedings taken upon notice to the adverse party, etc. The defendant in error has answered his own argument with reference to this when he contends that the word "deposition" is broad enough as used in the statute defining and punishing perjury to include all written testimony, including affidavits and sworn statements.

THE INDICTMENT DOES NOT CHARGE THAT PERJURY WAS TO BE COMMITTED BY APPLICANTS AT TIME OF FINAL PROOF.

The law so far as the timber and stone act is pertinent to the matter now under discussion may be found on page 66-67 of first brief of plaintiffs in error.

See also Compiled Statutes 1901, Volume 2, page 1545. It is now contended by defendant in error that this indictment not only charges that perjury was to be suborned not only when the preliminary papers were filed, but at the time of final proof. This contention is made in the face of the fact that at the first trial no such contention was made.

We understand that counsel is now saying that this contention was made at the time of the first trial, but it was not. For a full statement upon that subject see our first brief on this question. Counsel now contends that not only does the indictment charge that perjury was to be suborned at the time of final proof, but that the indictment is a peculiarly well drawn pleading in expressing that idea.

If well drawn it must be *peculiarly* so, as it was not until the third trial that the interpretation now contended for was placed upon it. An indictment is certainly peculiarly drawn if it definitely means only one thing, and at the same time misleads judges learned in law as well as counsel for both plaintiff and defendant.

It is argued that the contention of plaintiffs in error in this matter is based on their lack of knowledge of the technical terms used by officialdom. See page 18 of brief of defendant in error.

If the contention so made is the truth then the indictment is bad and the demurrer to it should have been sustained.

See United States vs. Reichert, Fed. Rep., Volume 32, page 147, wherein Justice Fields says:

> "An indictment is to be read to the accused unless the reading is waived. The language should therefore be so plain that one of ordinary intelligence can understand its meaning. For that purpose, common words are to be used as descriptive of the matter. Abbreviations of words employed by men of science or in the arts will not answer, without full explanation of their meaning in ordinary language. The use of the initials A. D. to indicate the year of our Lord is an exception because of its universality. Arabic figures and Roman letters have also become indicative of numbers as fully as words written out could be. They are of such general use as to be known of all men. They, therefore, may be employed in indictments. But the initials here have reference to the public lands as marked on the public surveys; they are signs used in a particular department of public business, and are not matters of general and universal knowledge by all speakers of the English language."

An argument of the defendant in error is based on the meaning of the words "declaration and deposition" as used in the indictment, and certain words used in the blank forms furnished by the commissioner of the General Land Office. The indictment undertakes to describe the proceedings in which, the time when and the place where perjury was to be suborned, and is as follows. See pages 9, 10 and 11, Transcript of Record:

> "That is to say to suborn, instigate and procure the said persons respectively to come in person before him, the said Marion R. Biggs, who was then and there a United States Commissioner for the District of Oregon, and, after being duly sworn by and before him, the said Marion R. Biggs, as such United States Commissioner, to state and subscribe under their oaths that certain public lands of the United

States lying in Crook county in said District of Oregon, open to entry and purchase under the Acts of Congress approved June 3rd, 1878 and August 4th, 1892, and known as timber and stone lands, which those persons would then be applying to enter and purchase in the manner provided by law, were not being purchased by them on speculation, but were being purchased in good faith to be appropriated to the own exclusive use and benefit of those persons respectively, and that they had not, directly or indirectly, made any agreement or contract in any way or manner, with any person or persons whomsoever, by which the titles which they might acquire from the said United States in and to such lands should inure in whole or in part to the benefit of any person except themselves, when in truth and in fact, as each of the said persons would then well know, and as they, the said John Newton Williamson, Van Gesner and Marion R. Biggs would then well know, such persons would be *applying to purchase* such lands on speculation."

It is manifest that the indictment charges only one time as the time when perjury was to suborn. If at different times it would have been so stated. Further, the words "then and there" are used further on in the indictment as referring to one time. The question arises, when does an applicant apply to purchase. We answer when he files his written statement in duplisate, as provided by Section 2. This section is preceded by the heading, "Application for purchase of Timber and Stone Lands, etc." This shows conclusively that the written staatement therein referred to (which is the preliminary paper) is the application to purchase, and again in this Section 2 it is provided that this statement must be verified by the *applicant*, and among other things, he must take his oath that he does not *apply to purchase* the land on speculation. Clause 3 of the Timber and Stone Act provides for final proof.

The only *act of application to purchase* on the part of the applicant is the execution of the application to purchase provided for in Section 2

It is to be noted further that the pleader has copied the very matter provided by law as found in Section 2 and alleges that the subornation of perjury consisted in the procuring of a false oath as to those very matters. It is significant that the pleader does not allege in the indictment that the subornation of perjury was to consist of swearing falsely to the very matters contained in the final proof, if he had in mind that the subornation of perjury was to take place at that time. Note the questions at the time of final proof concerning the matters and things touching which perjury was to be committed. Q. 13, page 288 in the testimony of claimant John S. Wadkins:

> "Have you sold or transferred your claim to this land *since making your* sworn statement, or have you directly or indirectly made any agreement or contract in any way or manner with any person whomsoever, by which the title which you might acquire from the United States may inure in whole or in part to the benefit of any person except yourself."

And the questions following on page 289, Nos. 14 and 15.

The pleader copies the very things that the applicant must swear to in his application to purchase as provided in Section 2, and alleges that the applicant was to swear falsely concerning some of those matters. It is not charged in the indictment that any false testimony was to be given concerning matters which the law provides under Section 3 shall be established at the time of final proof. If the pleader had in mind matters that some rule provides for the proof of at the time of final proof, would he not have referred to that mater clearly and identify it by the very words that the form makes use of in demanding proof of these matters?

The only words used in Section 5392 referring to testimony other than that orally given are: "Any writen testimony, declaration, deposition or certificate." The pleader in drawing this indictment made use of the word declaration and deposition, and it is argued because these words are connected by the conjunction "and" instead of the disjunctive "or" that he had in mind two different papers. It is submitted that the universal way of drawing indictments is to charge in the conjunctive instead of the disjunctive, so as to have the meaning broad enough in any event. If the pleader had wished to identify the papers by some name that would have been descriptive he could have done so provided he used any word that would be covered by the statu tory words as found in Section 5392. The words used by the statute are general.

In United States vs. Clark, 1st. Gall. 497, it is said:

> "The usual and ordinary meaning of the word 'deposition' is written testimony in legal proceedings."

As stated in the case of United States against Ambrose, 108 U. S. 340, cited by defendant in error, it is held that the words "declaration and certificate" are used in the ordinary and popular sense and signify any statement of material matters of fact sworn to and signed by the party charged. That they are words not used as terms of art or in any technical sense. It follows that the meaning of both of these words is so general that the use of either one of them would have covered affidavits and depositions, and consequently the meaning is so general as to be descriptive of no particular paper, and we are left to determine what is referred to in the indictment by other means. Again, if one refers to the papers furnished by the Land Office he finds the paper to be executed at the time of final proof, headed "testimony of

claimant," not deposition of claimant. See page 286 transcript of the record. On page 289 in the certificate signed by the United States Commissioner is found this expression: "That I verily believe affiant to be the person he represents himself to be." One might think from the use of the word affiant that the foregoing was an affidavit. Further on, on the same page in the note it is said:

> "Every person swearing falsely to a deposition is guilty of perjury."

The application to purchase as provided for in Section 2 of the Timber and Stone Act is called a "Sworn Statement" in the heading of the form used by the department. Further on the person signing the statement is made to depose as though he was a deponent in a deposition. The paper called the "Sworn Statement" in its heading, being the preliminary paper filed, is referred to as an affidavit in the certificate signed by the commissioner. See page 226 of Transcript of Record. The question recurs, Why did not the pleader describe these papers by some name that would identify them if he was seeking to identify the papers by name? From the foregoing it is seen that one is not aided in construing the indictment by the use of the alleged technical terms used by the Land Office Department in describing the application to purchase and the final proof papers. We submit that it is entirely clear that the pleader used the words "declaration and deposition" in a general way so as to have terms broad enough that would cover all written testimony, and that he relied upon other means to identify and point out the time when and the place where the perjury to be subborned was to be committed.

It is argued on pages 28 and 29 of brief for defendant in error that because, as alleged in the brief, the preliminary paper

in pre-emptions is called a declaratory statement, that the word "declarations" in this indictment refers to the preliminary paper in applications to purchase under the timber and stone act. It is also said that the pleader evidently had this in mind, and therefore referred to the application to purchase as a declaration. We submit that this contention is utterly devoid of merit. He used the word "declaration" because he found it in the statute defining perjury, and he used it in its generic sense as including all papers the decisions have held it to include. It is contended on page 30 of the same brief that no word used in the statutory definition of perjury will cover a simple affidavit unless it be the word "declaration," and again it is said page 22 that the word deposition in its generic meaning includes an affidavit. From the brief of the defendant in error it appears that the popular meaning of either "declaration or deposition" would include affidavit, and that the popular meaning is the one to be given to these words. It follows that if a pleader wished to describe and identify a paper by its name, it being a paper that fell within the meaning of either declaration or deposition, he would give it its specific name; and it is further apparent that in all cases where subornation of perjury is charged with reference to such paper, the proceedings would be identified where the perjury was to take place, as in this case.

Under the pre-emption act the pre-emptor was required by the law to file a written statement describing the land, "declaring his intention to claim the same," hence the form furnished was headed declaratory statement. The declaratory statement of a pre-emptor is as follows:

(No. 4-535)

PRE-EMPTION DECLARATORY STATEMENT FOR UNOFFERED LANDS.

I,....., of....., being....., have, on the..... day of....., A. D., 1900, settled and improved the.....quarter of Section No..... in township No.....of range No..... in the districts of lands subject to sale at the land office at..... and containing..... acres, which land has not been offered at public sale, and thus rendered subject to private entry, and I do hereby *declare my intention* to claim the said tract of land as a pre-emption right under section 2259 of the Revised Statutes of the United States.

My postoffice address is.....

Given under my hand this..... day of.....A. D., 190.....

.....

In the presence of.....of..... and.....of.....

This is not even sworn to and it is nothing but a declaratory statement. In it the claimant furnishes no proof and it is utterly unlike the application to purchase or the initial paper under the timber and stone act. If the mind of the pleader was searching for a name by which to designate and identify a paper that was to be filed in a timber claim, why did he not refer to it as a sworn statement, or if he wished to enlarge upon the description, why did he not refer to it as an affidavit called by the officials of the Land Department "A Sworn Statement," and by the statute an application to purchase?

He certainly was not ignorant of the technical terms used by the officials of the Department.

It, of course, is not necessary to use the general word declaration or deposition in an indictment. In fact the word declaration is so general in its meaning that it fails to describe a paper. And

if one wishes to identify a paper by name its specific name should be given.

That any one drawing an indictment should attempt to secure a name for a paper referred to and finally give it the name of a paper filed under an entirely different act and for an entirely different purpose when the paper which he wished to identify had a name of its own is very difficult to understand.

Or, to be more accurate and specific, it is difficult to understand why the pleader in this case should use the word "declaration" to identify the initial papers in timber and stone claims when such papers have a specific name, simply because the word declaration in a modified form only is found as a part of the name given to the initial paper in a pre-emption claim.

It is manifest that he used the word "declaration" because it is found in Section 5392 defining perjury and that he used the word in its popular and generic meaning.

We fail to see why it was thought necessary to resort to such an argument as this, as it is obvious that no one would be convinced by it and its inferences are so baseless that it weakens a proposition already incapable of being maintained.

The question is what does indictment mean, and is it certainly a question of some interest what did the accused understand it to mean. The defendants in this case are not compelled to resort to any such argument in order to discover the meaning of this indictment, and if they did they would not agree to the conclusion arrived at by counsel for the defendant in error.

It is said on page 29 of brief for defendant in error that the preliminary paper in a timber and stone act is a declaration of notice because the applicant therein "declares his intention to pur-

chase" the land under the timber and stone act. This is not true The words "declares his intention to purchase" are not to be found therein. On page 27 of the same brief it is said in substance in the very nature of things the conspirators must have intended to induce persons who applied to purchase the land to swear falsely, not only in the preliminary paper, but likewise in giving testimony at the time of making final proof as it was obviously the purpose of the conspirators to obtain title to the lands, and the pleader must have had these facts in his mind. We are not concerned with the facts that the pleader had in his mind, but we are only concerned with what is expressed in the indictment and can be found therein by any fair construction. The indictment undertakes to charge a conspiracy to suborn perjury. There is not a word in it to the effect that the defendants conspired to acquire title to land, but as far as any allegation is concerned in the indictment the ultimate purpose of the defendants was to secure a large number of people to commit perjury. It is submitted that the words, declarations and depositions were used in the indictment in their popular sense, and that they were connected by the conjunction "and" so that all possible kind of papers that might be sworn to would be included.

It is urged (page 19 brief of defendant in error) that because it is provided in Section 3 of the timber and stone act that upon the filing of such "statement" notice shall be published for a period of sixty days, and that after the expiration of said sixty days "if no adverse claim shall have been filed the *person desiring to purchase* shall furnish to the register," etc, that the person "desiring to purchase" is merely "applying to enter and purchase." It is charged substantialy in the indictment that at the time perjury was to be suborned each of the persons to be

suborned would then well know and as they, the said John Newton Williamson, Van Gesner and Marion R. Biggs, would then well know such persons would be applying to purchase said lands on speculation.

That is the persons to be suborned would be applying to purchase the land when the false oath was to be taken. Is it true that "the person desiring to purchase" means the same as the person applying to enter and purchase, or the person applying to purchase? The expression "desiring to purchase" is descriptive of the state of mind of such person, but does not describe the act, while the expression of applying to purchase refers to an act as does the expression applying to enter and purchase.

It is manifest that the pleader referred to one and the same act by using the words "applying to enter and purchase" as used in one place in the indictment and the expression "applying to purchase" in another place in the same instrument.

The indictment in fixing the time when and the proceedings in which the alleged perjury was to be suborned refers to an *act* and the only time when it is alleged that defendants and the persons to be suborned would know the matters sworn to to be false is when such persons would be applying to purchase.

When did they apply to purchase? The answer compels us to repeat.

Section 2 of the timber and stone act has this heading: "Application for purchase of timber and stone lands: false swearing: penalty."

What is done by a person in conformity with said Section 2 is therefore named an application to purchase.

In the affidavit filed in conformity with Section 2 the affiant uses these expressions: "That deponent has made *no other application under this act.*" "That he does not *apply to purchase* the same under speculation."

This section also provides that the statement must be verified by the oath of the "applicant."

It seems obvious that the initial paper under the timber and stone act is called by the statute an application to purchase, the person executing it, the applicant.

It follows that when he is executing such a paper he is applying to purchase and applying to purchase and enter. Section 3 of said act provides what shall be done after a person has applied to purchase and is headed "Publication of Application for Purchase; Proof," etc. This third section provides for the publication of an application to purchase, not the making of it and for final proof. In so far as it provides for the publication of an application to purchase it refers to what has already been done.

The initial papers and final proofs are so distinct, both in substance and time of filing in matters before the land office, that if the intention was to refer to both, such intention would be made plain.

Under Section 3, if a person still desires to purchase he should comply with Section 3, but he does not apply to purchase a second time.

If a person having applied to purchase no longer desires to purchase he may abandon his application. It is obvious that a person may be an applicant and not be applying to purchase. He must be making an application to purchase in order to be applying to purchase, but after such application to purchase is made he may be an applicant although he is performing no act.

In such case he is an applicant by reason of something heretofore done.

THE COURT ERRED IN INSTRUCTING THE JURY THAT IT MIGHT BASE A CONVICTION ON A CONSPIRACY TO SUBORN PERJURY AT THE TIME OF FINAL PROOF, AND IN ADMITTING EVIDENCE TENDING TO SHOW SUCH A CONSPIRACY, AND IN ADMITTING EVIDENCE TENDING TO SHOW THAT SEVERAL PERSONS SWORE FALSELY CONCERNING MATTERS AND THINGS NOT REQUIRED TO BE PROVED AT THE TIME OF FINAL PROOF OR AT ANY OTHER TIME BY A STATUTE OF THE UNITED STATES, BUT ONLY BY A RULE OF THE COMMISSIONER OF THE GENERAL LAND OFFICE.

We shall not at first discuss the question of whether or not the regulation made by the Commissioner of the General Land Office relative to matters to be proved at the time of final proof under the timber and stone act is reasonable, but we now confine ourselves to the general question of whether or not a *regulation* made by a head of a department is a *law* of the United States in the sense than an act committed or omitted in violation of such a regulation, either forbidding it or commanding it is a *criminal offense*. To be exact, our contention is that such *regulation* is not a *law* of the United States within the meaning of the phrase as used in Section 5392 defining perjury.

As noted in our former argument, Section 3 of the timber and stone act provides what shall be proved at the time of final proof in order that a patent may issue to the applicant, and it

nowhere provides for the testimony called for in the rules of the Commissioner of the General Land Office concerning which it is alleged plaintiffs in error conspired to have perjury committed.

It is nowhere provided by statute that the applicant shall submit proof *at any time* that he has made no contract *since making or filing his sworn statement,* whereby the title which he may acquire shall inure to the benefit of any other person or persons.

The sworn statement provided for by statute under Section 2, which is the initial paper of the applicant, contains all of the matters and things concerning which it is alleged that false oaths were to be taken.

The regulation under discussion calls for proof of matters in order that a patent may issue which the statute does not provide for, and it in consequence adds to the statute, prescribes conditions not provided for by Congress and is legislation pure and simple.

In order to be guilty of a conspiracy to suborn perjury, plaintiffs in error must have conspired to have some person commit the crime of perjury, namely, take an oath before a competent tribunal officer or person in a case in which a *law of the United States* authorizes an oath to be administered, that he will testify, etc., truly and then wilfully and contrary to such oath state or subscribe any material matter which he does not believe to be true.

See Section 5392, Revised Statute.

The question is, is the regulation under discussion, requiring matter additional to that required by statute to be sworn to at the time of final proof *a law of the United States,* within the

meaning of the term as used in Section 5392 of the Revised Statutes defining perjury. If such regulation is not a law of the United States within the meaning of the phrase in that section, our contention is correct.

In support of the proposition that we are now making we cite the following self-explanatory letter of the Secretary of the Interior to the Speaker of the House of Representatives, transmitting a communication from the Commissioner of the General Land Office, together with the proposed amendment to Section 5392, of the Revised Statutes defining perjury and prescribing a penalty.

"House of Representatives

59 Congress 1st Session — Document No. 219

PENALTY FOR PERJURY IN EXECUTION OF PUBLIC LAND LAWS.

LETTER
from
THE SECRETARY OF THE INTERIOR,
Transmitting
With the communication from the Commissioner of the General Land Office, the draft of a bill to amend the law relating to perjury.

December 15, 1905.—Referred to the Committee on the Public Lands and ordered to be printed.

Department of the Interior,
Washington, December 13, 1905.

Sir: I have the honor to enclose the draft of a bill "To amend Section 5392 of the Revised Statutes," and to recommend that it be enacted into a law.

Accompanying the draft is a letter in relation thereto from the Commissioner of the General Land Office.

Very respectfully,

E. A. HITCHCOCK,

Secretary

The Speaker of the House of Representatives.

Department of Interior

General Land Office.

Washington, D. C., November 25, 1905.

Sir: Your attention is partciularly invited to the following quotation from my last annual report relative to the amendment of the statute prescribing punishment for perjury:

Section 5392, Revised Statutes, provides that every person falsely swearing under any oath administered "in any case in which the laws of the United States authorizes an oath to be administered" shall be guilty of perjury. In the execution of the public land laws it is imperatively necessary that certain facts be established by oaths which are not specifically required by the laws of the United States, but are required by departmental regulations or orders—oaths essentially necessary in disposing of the public lands. It has been repeatedly held that a charge of perjury cannot be based upon an affidavit required only by departmental regulations.

The necessity for such an amendment is clearly apparent from the decision of the court in the case of United States v. Maid. (116 Fed. 650). Section 2302, Revised Statutes, declares that mineral lands shall not be liable to settlement or entry under the homestead laws. It therefore becomes necessary for this office to have evidence as to the nonmineral character of the lands applied for by a homesteader, and to meet that necessity each applicant has been required by Department regulation to file with his application an affidavit that his lands are agricultural in character and contain no mineral. Maid was indicted, in the above case, for swearing falsely to this affidavit, and the court held that he could not be punished, because he was not required by statute to make such an affidavit. Sections 2290 and 2291 require a homesteader to swear to certain specified facts, but the nonmineral character of the lands is not one of the facts there specified, and for that reason an applicant may with impunity swear falsely as to that fact, and leave the Office at his mercy in its attempts to protect the Government against fraudulent entries.

Other instances might be mentioned and other decisions cited, but this case serves to fully illustrate the situation and demonstrate the necessity for an amendment of this statute, since there are very many instances in which all officers of the Government must rely upon oaths not specifically required by any statute.

It is therefore respectfully suggested that this matter be called to the attention of Congress, with appropriate recommendations as to the passage of a bill along the lines of the proposed draft herewith submitted.

Very respectfully,

W. A. RICHARDS,

Commissioner.

A Bill to amend Section fifty-three hundred and ninety-two, of the Revised Statutes.

Be it enacted by the Senate and the House of Representatives of the United States of America in Congres assembled, That section fifty-three hundred and ninety-two of the Revised Statutes of the United States be, and the same is hereby, amended to read as follows:

Revised Statutes, Sec. 5392. Every person, who, having taken an oath before a competent tribunal officer, or person, in any case in which a law of the United States or any regulation or order issued pursuant to law by the head of any department, bureau, or office of the Government of the United States, requires or authorizes an oath to be administered that he will testify, declare, depose or certify truly, or that any written testimony, declaration, deposition or certificate by him subscribed is true wilfully and contrary to such oath states ar subscribes any material matter which he does not believe to be true, is guilty of perjury and shall be punished by a fine of not more than two thousand dollars and by punishment at hard labor not more than five years and shall moreover, thereafter, be incapable of giving testimony in any court of the United States until such time as the judgment against him is reversed."

The case cited by Commissioner Richards, in the foregoing communication, 116 Fed. 650, is very instructive as it meets squarely several of the contentions made by the defendant in error. Maid was indicted under Section 5392 for swearing falsely to a non-mineral affidavit in a homestead entry.

Section 2302 of the Revised Statutes declares that mineral lands shall not be liable to settlement or entry under the homestead laws, so the declared policy of the law was not to allow entries of mineral lands by homesteaders, hence the propriety of a regulation providing for a non-mineral affidavit in this kind of an entry. The statute, however, prescribes what proof should be sufficient for a homesteader and it nowhere provides for a non-mineral affidavit, hence the only authority for administering the oath to such an affidavit was the authority of the Commissioner to make rules, and his rules providing for such an affidavit. The Court, nevertheless, held that the statute could not be added to for criminal purposes by a departmental regulation, and it therefore was not perjury for a person to swear falsely to a non-mineral affidavit in a homestead entry, as a criminal offense against the United States cannot be predicated of a violation of a requirement imposed only by a rule or regulation of one of the executive departments of the government. The case of the United Staes against Maid is decisive of the case on trial. In the course of the opinion Judge Wellborn refers to several cases cited by the defendant in error and shows why they are not applicable in the case of the United States against Maid, and also why they are not applicable in this case.

In fact the opinion in the Maid case settles every contention, on the point under discussion, in favor of plaintiffs in error, and both Secretary Hitchcock and Commissioner of the General Land Office Richards, concur in that opinion.

The case of Eaton against United States 144 U S 677, Book 36 L Ed p 591, is cited by us in our first brief and commented on by the defendant in error. The defendant in error at page 03, undertakes to avoid the force of the decision by saying, among other things, that in the Eaton case a person could commit the alleged offense without any affirmative or willful or corrupt act on his part. Eaton was a wholesale dealer in oleomargarine, being engaged in carrying on that business and under the allegations of the indictment he willfully failed and neglected to keep the books, and make the returns prescribed by the regulations made by the Secretary of the Treasury in that particular. Section 18 of the act provides that if any manufacturer of oleomargarine, any dealer therein, or any importer or exporter thereof shall knowingly or wilfully *omit, neglect* or refuse to do or cause to be done any of the things required by law in the carrying on or conducting of his business, or shall do anything by this act prohibited, etc., he shall be subject to a penalty. The act prescribes the same penalty for a person knowingly or wilfully omitting to do something prescribed as it does for knowingly or wilfully doing something that is prohibited.

Eaton by engaging in the business of dealing in oleomargarine became subject to the law concerning that matter and the rules and regulations made in pursuance of law, and there is no distinction between a sin of commission and omission in this particular and that such an argument should be used indicates the weakness of the contention being made by the person using it. Section 20 of the act above referred to (24 Statutes at Large 212) provides:

> "That the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury may make all needful rules and regulations for the carrying into effect of this act."

In compliance with the authority thus conferred, he made rules as follows:

> "Wholesale dealers in oleomargarine will keep a book (form 61) and make a monthly return on form 217, showing the oleomargarine received by them and from whom received; also the oleomargarine disposed of by them and to whom sold or delivered."

Eaton being a wholesale dealer in oleomargarine willfully neglected to observe the rules above mentioned and he was indicted and charged with a violation of these rules, and here it might be noted that if the pleader in the indictment in the case on trial had wished to specify the time of final proof as the time when perjury was to be suborned he would have in all probability referred to the rules covering the case.

The Court says on page 593 L Ed:

> "But although the regulation above recited may have been a proper one to be made under Section 20 of Aug. 2nd, 1886, yet the question to be determined in this case is whether or not a wholesale dealer in oleomargarine who knowingly and willfully fails and omits to keep the book and make the monthly return prescribed in the regulation of the Commissioner of Internal Revenue, thereby fails and omits within the meaning of Section 18 of the act to do a thing 'required by law in the carrying on or conducting of his business' so as to be liable to the penalty prescribed by that section."

The question that the Supreme Court of the United States passed upon in the Eaton case then was this: Admitting that the regulation was a proper one to be made were the things required by the regulation, things required by law, so that the violation of the regulation made the party violating it subject to a penalty in criminal proceedings.

The court referring to the case of Morrill vs. Jones, 106 U S 466, which is also discussed in our first brief, which was a civil proceeding, says:

> "Much more does the principal therein announced apply to a case where it is sought substantially to prescribe a criminal offense by the regulation of a department. It is a principle of criminal law that an offense which may be the subject of criminal procedure is an act committed or omitted in violation of public law, either forbidding or commanding it."

In the Eaton case a regulation of the Department was violated by his willfully failing to do what the rule commanded him to do, but he was subject to no penalty because, although re-required by the *regulation* to do the thing he was not required by *law* to do it.

In this case Section 2 provides just exactly what an applicant shall do with reference to the matters concerning which it is alleged perjury was to be committed, and if Congress had desired proof like what the rules prescribed it would have provided for it and fixed the penalty.

In re Kollock, 165 United States 533, L. Ed., Book 41, page 813, is cited by defendant in error in support of the contention that he is making, and we submit that the case is authority against his contention and not in support of it, and is a good illustration of the distinction that we are seeking to draw. We wish to note also that Kollock was convicted for *failing to do something;* being a retail dealer in oleomargarine he handled it without having the packages containing it marked and branded as the Commissioner of the Internal Revenue with the approval of the Secretary of the Treasury had prescribed.

The point to be noticed is this. By the terms of the act manufacturers of oleomargarine are required to pack it in wooden packages, marked, stamped and branded as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall prescribe, and all sales by manufacturers and wholesale dealers must be in original stamped packages.

Retail dealers are required to pack the oleobargarine sold by them in suitable wooden or paper packages, which shall be marked and branded as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury shall prescribe.

Section 18 of the act provides a penalty, if any manufacturer of oleomargarine or any dealer, or any importer or exporter thereof shall knowingly or willfully neglect or refuse to do or cause to be done any of the things required by law in the carrying on or conducting his business, or shall do anything by this act prohibited.

For the statutory law see statement of Chief Justice Fuller on pages 527, 528, 529 and 530.

The law, by its terms, provides that a person engaged in the business of Kollock should pack his product in wooden packages, marked, stamped and bronded as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall prescribe. The statute also provided a penalty for omitting to do anything required by law or do anything by the act prohibited, and the court held that the act of Aug. 2nd, 1886, the one above refered to, sufficiently defines the offense by requiring the packages to be marked and branded, prohibiting the sale of packages that are not and prescribing a penalty for sales in violation of its provisions, leaving the mere description of particular

marks, stamps and brands to be determined by those officers, saying at the close of the opinion on page 537, and "we are of the opinion that leaving the matter of designating the marks, brands and stamps to the Commissioner with the approval of the Secretary involve no unconstitutional delegation of power."

On page 533 it is said:

> "We agree that the courts of the United States in determining what constitutes an offense against the United States must resort to the statutes of the United States enacted in pursuance of the constitution. But here the laws required the packages to be marked and branded, prohibited the sale of packages that were not, and prescribed the punishment of sales in violation of its provisions; while the regulations simply described the particular marks, stamps and brands to be used. The criminal offense is fully and completely defined by the act and the designation by the Commissioner of the particular marks and brands to be used was a mere matter of detail."

This decision is in line with other decisions and while not directly deciding the contention that we are making, it, by inference and analogy, is conclusive that the proposition we are making is correct.

It is argued by defendant in error that the Court in the Kollock case points out a difference in effect between willfully omitting to do something commanded by a regulation and willfully doing something prohibited by it; there is no difference of the nature claimed. If one is a crime the other is. In the Kollock case, he being a dealer in oleomargarine willfully failed to brand the product. In the Eaton case, he being a dealer in oleomargarine failed to keep the books and make the returns provided for by the regulation. The Court in the Eaton case held that Eaton was not guilty because he had willfully omitted no duty required by law. But Kollock was held guilty, although his sin was one

of omission, and he was held guilty because in the opinion of the Court his act was a violation of the statute, which provided that dealers in oleomargarine should make and stamp their product, etc., and prescribed a penalty for failure so to do, leaving the detail of what the distinguishing stamp should be to the Commissioner of Internal Revenue who was to act with the approval of the Secretary of the Treasury. In failing to make and brand his product Kollock violated the statute because the statute provided that it should be marked and branded, and provided a penalty for failing to do so.

In the Kollock case the Court says, referring to the case against Eaton, page 535:

> "In that case the wrong was in the violation of a duty imposed only by a regulation of the Treasury Department."

Eaton carried on the oleomargarine business in violation of the regulations of the Department and when any reference is made to the case by a statement of the facts in any decision there is no point attempted to be made because he failed to do something required by the regulation instead of doing something prohibited by it. To recapitulate, in the Eaton case defendant dealt in oleomargarine and willfully failed to keep the books and make the returns required by a regulation. The statute prescribed a penalty for wilfully failing to do a thing *required by law* or willfuly doing a thing prohibited by it. Eaton was held not guilty because in failing to doa thing required by the *regulation* he had not failed to do a thing required by *law*. In the Kollock case, Kollock dealt in oleomargarine and failed to brand his packages and was held guilty because the law itself provided that such packages should be branded and prescribed a penalty for failing to do so. The regulation involved merely dealing with the kind of a brand to be placed upon the packages.

It was not left to the head of any department to determine whether packages of that sort should be branded or not, or whether there should be a penalty for failure so to do. The provisions of the law covered both points.

The statute itself described the offense and affixed a penalty. It is said by counsel on page 65:

> "In the Eaton case it was held that the mere 'neglect' to do a thing required by a regulation made by the president or a Department could not be made a criminal offense where the statute did not distinctly make the 'neglect' in question a criminal offense. The Supreme Court pointed out the obvious fact that the mere 'neglect' to do something required by a Department was a far different matter than is a case where no violation of the regulation is charged, and wherein the contrary the party committed the offense by complying with the regulation and in violating an express statute defining his crime while doing so."

By the last part of the above question we understand that counsel means to say that if a person takes a false oath at the time of final proof in a timber and stone entry and swears falsely concerning matters that are provided to be proved only by a regulation of a department then he would be guilty of perjury, and that persons conspiring to have him do so would be guilty of conspiracy to suborn perjury. A person is guilty of perjury only when he takes an oath where a law of the United States authorizes the same to be administered. He is guilty of a conspiracy to suborn perjury only when the conspirators intend that a willful false oath should be taken in a mater where a law of the United States authorizes an oath to be administered. It follows then that a person complying with the regulation under discussion and swearing falsely with reference to the matters concerning which the oath is administered violates no express statute defin-

ing his crime, namely 5392 defining perjury, unless the regulation is a law of the United States because the offense defined and punished in 5392 is willful false swearing in any case in which a *law of the United States* authorizes an oath to be administered. Note the amendment which Secretary Hitchcock and the Commissioner of the General Land Office have requested Congress to make, an amendment which would make Section 5392 provide a penalty in case a person should take a willful false oath in any case in which a law of the United States *or any regulation or order issued pursuant to law by the head of any department, bureau or office of the government of the United States* requires or authorizes an oath to be administered.

The proposed amendment indicates clearly in the judgment of the persons proposing it, (and their judgment is founded upon decided cases) that a *regulation* authorizing or requiring an oath is not the same thing as a *law* of the United States authorizing an oath.

Counsel's argument in this particular is without foundation. He says that a person complying with a regulation violates an express statute, namely, 5392, when one can violate 5392 only by taking a willfull false oath in a case where a *law* of the United States authorizes an oath.

That is he admits that the oath is authorized by a regulation only, and in taking a willful false oath authorized by a regulation only, counsel contends that one violates an express statute which cannot be violated unless the oath is authorized by a *law* of the United States.

We quote again the closing remark in the decision in the Eaton case page 594 L. Ed.:

"Regulations prescribed by the President and by the heads of departments, under authority granted by Congress, may be regulations prescribed by law, so as lawfuly to support acts done under them and in accordance with them, and may thus have, in a proper sense, the force of law; but it does not follow that a thing required by them is a thing so required by law as to make the neglect to do the thing a criminal offense in a citizen, where a statute does not distintly make the neglect in question a criminal offense."

In the Maid case above cited the regulation required a non-mineral affidavit in a homestead entry, but as the law of the United States did not authorize such an oath, a person (to use expression in the brief of defendant in error) complying with the regulation concerning the non-mineral affidavit did not violate Section 5392 defining perjury because the regulation is noa a law within the meaning of the word as used in Section 5392. In this connection it is to be noted that the regulation although made in pursuance of law is not a law of the United States within the meaning of theword as used in 5392 of the Revised Statutes, and it is so held in the Eaton case, and in the Maid case, and inferentially in the Kollock case, or to put it a little more accurately, in the Eaton case, it was held that the regulation there under discussion, although properly made, requiring dealers in oleomargarine to keep certain books and make certain returns,did not come within the meaning of that particular statute which prescribed a penalty for omitting to do the things *required by law* or doing the things prohibited by law.

We now cite some cases which further ilustrate the principal that we are contending for, and which are valuable because of the reasoning of the judges and their comments as to what the various cases cited by both parties in this argument hold. The cases which we wish to cite now are those of the United States vs. Blasingame, 116 Fed. Rep., p. 651, and the recent case of the

United States against Matthews, 146 Fed. 306. These cases arise under the same act. In the last mentioned case the defendant was indicted for having wrongfully and unlawfully and wtihout permit required by law and regulations made by the Secretary of Agriculture grazed sheep on the Mt. Rainier Forest Reserve. The act, which is sufficiently set out on the page of the Reporter referred to, provides:

> "The Secretary of the Interior shall make provisions for the protection against destruction by fire and depredations upon the public forests and forest reservations which may have been set aside or which may be hereafter set aside under the said Act of March third, eighteen hundred and ninety-one, and which may be continued; and he may make such rules and regulations, and establish such service as will insure the objects of such reservations, namely, to regulate their occupancy and use and to preserve the forests thereon from destruction; and any violation of the provisions of this act or such rules and regulations shall be punished as is provided for in the act of June fourth, eighteen hundred and eighty-eight, amending section fifty-three hundred and eighty-eight of the Revised Statutes of the United States."
>
> Act June 4, 1897, c 2, 30 Stat. 34 (U S Comp St 1901 p 1540)

It will be observed that this act undertakes to prescribe a penalty for a violation of the provisions of the act, and also for a violation of the rules and regulations made pursuant to the authority conferred, and it differs from the case under discussion in many ways, and particularly because the law provides a penalty for an infraction of the rules and regulations, and in a general way defines the offense by indicating the subject matter of the regulations. The intent of Congress to punish infractions of the rules made is apparent. While there is absolutely no such expression of intent on the part of Congress in the case being heard. This act has been held unconstitutional by district judges several

times in so far as it undertakes to confer upon the Secretary of the Interior power to make rules and regulations, the infraction of which is punishable as for a crime.

Note the distinction between these cases and the Kollock case In the Kollock case, the law provides that the dealer in oleomargarine should mark the packages containing it, and provided a penalty for his failure to do so, and delegated to the head of a department the power to prescribe the kind of mark and brand to be placed upon the packages. It did not leave to the discretion of the head of a department whether the packages should be marked and branded or not, but it described an offense and declared its punishment. In the Matthews case it is left to the judgment and discretion of the Secretary of the Interior to make rules and regulations; just what those rules and regulations would cover, what they would provide, no one could say in advance except that they would be such rules as would in the judgment of the Secretary insure the object of the reservations, etc. Hence it is held that the authority to legislate was sought to be conferred upon the Secretary of the Interior, and that such rules and regulations when so made are invalid to the extent that a person is not criminally liable for an infraction of such rules.

It is not held in the Matthews case that the rules and regulations so made may not be enforced in a civil proceeding and as a matter of fact the judge rendering the opinion in the Matthews case upholds bills praying for an injunction to prevent the grazing of sheep on the reserve in violation of rules so made. The government ought to be able to establish rules and regulations for the management of its property so that the property can be managed in accordance with the will of the owner without calling upon Congress to pass an act governing the management of such property.

It does not follow, however, that the violation of a rule so made would subject the person guilty of the infraction to a criminal prosecution.

Much has been said in the brief of defendant in error concerning the case of United States against Bailey, 9th Peters, 238, 9 L. Ed., 113, and Caha vs. United States, 152, U. S. 211 (38 L. Ed. 415). Notwithstanding the fact that the Bailey case was discussed somewhat fully in our opening brief, we wish to call the Court's attention to the case again and we submit that it is not an authority in support of the contention made by the defendant in error.

Bailey was indicted for false swearing under Section 3 of an Act of Congress of March 1st, 1823, which provides:

> "That if any person shall swear or affirm falsely touching the expenditure of public money or in support of any claim against the United States, he shall upon conviction thereof, suffer as for wilful and corrupt perjury."

It is to be noticed that the crime denounced here is not perjury. The Court says, page 254:

> "That act (referring to the one under consideration) does not create or punish the crime of perjury technically considered, but it creates a new and substantive offense of false swearing and punishes it in the same manner as perjury."

It appeared that the Secretary of the Treasury had for a long time required affidavits in matters of this kind and it is said by the Court, page 256:

> "Congress must be presumed to have legislated under this known state of the laws and usage of the Treasury Department. The very circumstance that the Treasury Department had, for a long period, required solemn verifications of claims against the United States, under oath, as an

appropriate means to secure the government against frauds, without objection; is decisive to show that it was not deemed an usurpation of authority.

"The language of the Act of 1823 should, then, be construed with reference to this usage. The false swearing and false affirmation referred to in the act ought to be construed to include all cases of swearing and affirmation required by the practice of the department in regard to the expenditure of public money, or in support of any claims against the United States."

The Court further says:

"The language of the act is sufficiently broad to include all such cases."

And again it is said:

"There is nothing new in this doctrine. It is clear by the common law that the taking of a false oath with a view to cheat the government, or defeat the administration of public justice, though not taken within the realm, or wholly dependent upon the usage and practice, is punishable as a misdemeanor."

The case of O'Mealy vs. Newell (8 East. Rep. 364) affords an illustration of this doctrine.

Not to quote literally from the case last cited, it is sufficient to say that it was there held to be a misdemeanor at common law and punishable as such, if a person made or knowingly used a false affidavit of debt, sworn to before a foreign magistrate, in a foreign country, for the purpose of holding a party to bail in England; although such affidavit was not authorized by any statute, but was solely dependent upon the practice and usage of the courts of England. The substance of the court's holding in the Bailey case is that what was before a common law offense was now made a statutory offense.

Or, in other words, whenever an affidavit was admitted in evidence by the Treasury Department, if the affiant swore falsely in support of a claim against the United States he was guilty of an offense denounced by the statute.

It is said on page 253:

> "It is admitted there is no statute of the United States which expressly authorizes any justice of the peace of a state, or indeed any officer of the national government, judicial or otherwise, to administer an oath in support of any claim against the United States under the act of 1832. And the question is whether, under these circumstances, the oath actually administered in this case was an oath upon which there would be a false swearing, within the true intent and meaning of the Act of 1823." (See ch. 165.)

It is to be observed that the question was whether this was a case of false swearing within the meaning of the act providing that if a person should swear falsely in the matter refered to he was guilty of an offense. The act did not provide that a person should be guilty if he should swear falsely before any competent officer or tribunal in a case in which a law of the United States authorizes the administration of an oath, as is provided in Section 5392. It is submitted that the statute of 1823 sufficiently described the offense of false swearing and affixed a penalty, and the regulation of the department had nothing to do with the creation of the offense; but the custom of the department in receiving evidence of this kind under oath was approved by this legislation and the legislation made with reference to it. So that if a person should swear falsely to an affidavit of this sort in a foreign country, or should make an affidavit of any kind which would be received in evidence by the Secretary of the Treasury, and swear falsely, he would be guilty under this act. A careful reading of the case of the United States against Bailey will con-

vince any one that it is not authority for the defendant in error in this case.

Note the wording of the opinion on page 248:

"In prosecuting Bailey, therefore, for false swearing, in support of a claim against the government, nothing was done which the common law would not sanction. But as it is not contended that the Circuit Court derives from the common law any power to punish offenses; it remains to show that the indictment and the case shown in the certificate, fall within the statute upon which the prosecution was based. In doing this, it will appear that the Act of 1823 creates no new offense. It only prescribes a punishment for, and gives the courts of the Union jurisdiction to try an offense before known to the common law. It simply converts a common-law misdemeanor into the special statutory offense of 'false swearing.' As a statutory offense only, it is a new one. In a prosecution founded upon the Act of 1823, it is not necessary to show the requisites of technical perjury. It is necessary merely that the case be brought within the words of the statute. This is all that is ever required upon indictments concluding against the form of a statute.

"The words of the act are that 'if any person shall swear falsely in support of a claim against the United States, he shall suffer,' etc. It does not say how, or before whom, the false oath punished by it shall be taken. Why was the act made thus general? The answer is that the law-makers were aware of the practice of the government in every department to receive oaths before state officers in support of claims. The inconvenience of abolishing this practice, and requiring claimants to go in all cases before Federal judges, was obvious. Congress, therefore, left the practice undisturbed, as it had always existed; but affixed to falsehood in these oaths the punishment of perjury. Indeed, considering the uniform practice of the departments and of Congress itself to receive these oaths as evidence, and the presumption that it must have been in the minds of the legislators, at the time of the adoption of the Act of 1823, the conclusion cannot well be resisted that the generality of the language of that act was of purpose to embrace oaths such as this."

Further on, on page 249, it is said:

> "Without any particular inquiry as to the jurisdiction, does not the Act of 1823 extend to every case in which a false oath is actually taken in support of a claim? Doe s it not embrace every case in which the oath is by the admitted practice of the department received as evidence in support of claim? It is contended that it does."

The Bailey case when carefully considered does not support the contention of the defendant in error, but does inferentially and by analogy support the contention of the plaintiffs in error. It may be suggested that there was no necessity for the act under which the indictment was framed in the Bailey case if the false swearing would have been perjury under Section 5392 of the Revised Statute, and it was passed to cover cases not covered by the perjury act.

See Section 1029, Bishop's New Criminal Law, Volume 2, to the effect that certain false affirmations on oath were punishable as misdemeanors while not amounting to the offense of perjury.

The case of Caha vs. United States, above cited, has furnished counsel for defendant in error with a phrase with which possibly they may have deceived themselves, and it is this:

> "All that can be said is that a place and an occasion and an opportunity were provided by the regulations of the department, at which the defendant committed the crime of perjury in violation of Section 5392."

Caha was indicted for perjury in a homestead contest, and the question that he raised was this: did the local land officers, in hearing and deciding upon the contest with respect to the

homestead entry, constitute a competent tribunal, and was such contest so pending before them a case in which the laws of the United States authorize an oath to be administered? It appears from the opinion that the law expressly provides for a contest in pre-emption entries, but does not provide expressly for a contest in a homestead case. The Court says in its opinion, page 218:

> "We have, therefore, a general grant of authority to the Land Department to prescribe appropriate regulations for the disposition of the public land; a specific act of Congress authorizing contests before the local land offices in cases of pre-emption; rules and regulations prescribed by the Land Department for contests in all cases of the disposition of public lands, including both pre-emption and homestead entries; *and the frequent recognition by acts of Congress of such contests in respect to homestead entries.* Clearly, then, within the scope of Section 5392, the local land officers, in hearing and deciding upon a contest with respect to a homestead entry, constituted a competent tribunal, and the contest so pending before them was a case in which the *laws of the United States* authorized an oath to be administered."

A subsequent frequent recognition by acts of Congress of homestead contests confers just as much authority upon the officers to hear and determine the contest, and to administer oaths and make such contest a case in which a law of the United States authorizes an oath to be administered, as though Congress in advance had enacted everything contained in the rules and regulations providing for the contest.

Judge Brewer in delivering this opinion says, at page 219, referring to the Bailey case, that Bailey's conviction of perjury was sustained; and again on the same page he says it was contended that, therefore, perjury could not be laid in respect to a false affidavit, etc.

Bailey was not charged with perjury, nor convicted of perjury, as quotations from the opinion in that case found in different parts of our brief amply prove. He was indicted for false swearing, which was punishable under the statute the same as perjury, the statute under which he was indicted defining and covering his offense.

The same judge, in deciding the case of United States vs. Curtis, 107 U. S. 671, 27 L. Ed. 534, says: referring to the Bailey case

> "That was an indictment for false swearing. It was based upon an act of Congress which provides that if any person shall swear or affirm falsely touching the expenditure of public money, or in support of any claim against the United States, he should, upon conviction, suffer as for willful, corrupt perjury."

Mr. Justice Brewer in deciding the last case certainly understood that Bailey was not indicted for perjury.

The Court further says, page 219:

> "This perjury (referring to the one in the Caha case) was not merely a wrong against that tribunal, or a violation of its rules and regulations; the tribunal and the contest only furnished the opportunity and the occasion for the crime, which was a crime defined in and denounced by the statute."

The fact that Congress had frequently recognized these contests by various acts constituted the land officers a proper tribunal and the contest a case in which the laws of the United States authorize the administration of an oath, and consequently the regulations having been adopted as laws of the United States furnished the opportunity for a person to commit perjury within the meaning of Section 5392.

The frequent recognition by act of Congress of the rules providing for homestead contests before the Land Office officials

made homestead contests a case in which laws of the United States authorized the administration of an oath.

And, further, the homesteader, in order to prevail in a contest, had to substantiate only such matters and things as the law required proof of in order to entitle him to a patent.

While in the case on trial proof was required of matters not required by statute to be proved at all, and there has been no recognition of the regulations in question by any act of Congress.

A compliance with a regulation of the Land Department, it being a regulation not recognized by Congress, cannot furnish an occasion and opportunity wherein one may violate Section 5392 by taking a willful false oath in a case where a *law of the United States* authorizes an oath; only a law of the United States authorizing an oath can furnish such an opportunity and occasion.

The Caha case is founded upon correct principles, and the decisions would have been otherwise if contests in homestead entries had not been recognized by acts of Congress.

Counsel for defendant cites one case, namely, that of Ralph vs. United States, Fed. Rep., Vol. 9, p. 693, saying that it is an instructive case.

It may be instructive, but not as indicating what the law is.

The judge in that case seems to hold that a head of a department may make a rule prescribing that certain matters shall be proved not required by law, and direct before whom the oath shall be taken, and that a person swearing falsely concerning matter would be guilty of perjury. As is said in United States vs. Manion, Vol. 44, Fed. Rep., p. 801:

"Perjury can only be assigned upon an oath authorized by a law of the United States. Law, according to the most familiar definition of that term, is a rule prescribed by the supreme power of the United States. Now, the Commissioner of the General Land Office is not the supreme power of the United States. He does not create the laws of the United States, and he cannot be endowed with power to do so while the present constitution is upheld. He may exact from all who transact business in his bureau and in the district land offices compliance with the rules and regulations which he is authorized to make, but he cannot prescribe a rule which can have the force of a law of the United States, and the violation of which can be punished as a felony."
See the case above cited for an exposition of Judge Hanford's opinion.

Counsel also cited as an instructive case United States against Hearing, Fed. Rep., Vol. 26, p. 744. In this case Judge Deady held that:

"An applicant for the entry of land, under the homestead act, may make oath to the excusatory facts that authorize him to verify the affidavit accompanying his application, before the clerk of the county, as provided in Section 2294, Revised Statutes; and if such oath is willfully and knowingly false in any particular, the applicant is guilty of perjury."

The objection was made that this was not a case in which a law of the United States authorizes an oath to be administered. On page 748, Judge Deady says:

"On the whole, my conclusion is the Act of 1864, permitting an applicant to make his affidavit for a homestead entry in a certain contingency before a clerk by a necessary implication, requires such applicant, before he can avail himself of such privilege, to show by oath that such contingency exists; and that the clerk may, as incidental to his power to take an affidavit, administer such oath."

The judge held, therefore, that by necessary implication a law of the United States required the matter alleged to be false

in the indictment to be sworn to, and that the law gave the clerk who administered the oatth authority to administer it. Hence, Judge Deady's final conclusions are correct, if the law provided that the matter should be sworn to and authorized the person administering the oath to administer it. The criticism that we make of the case is this: that the judge seems to think that whether this was so or not, that a regulation of the department might take the place of the law. He was unable to find any regulation of the kind indicated, and the opinion is a very unsatisfactory one.

The case is probably cited by defendant in error on account of the reference Judge Deady makes to the Bailey case. The judge quotes the Bailey case to this effect, page 747:

> "In United States vs. Bailey, 9 Peters 238, it was held that the Act of March 1st, 1823 (3 St. 771), declaring 'that if any person shall swear or affirm falsely touching the expenditure of public money, or in support of any claim against the United States, he shall be guilty of perjury,' included, in the language of the syllabus, 'an affidavit taken before a state magistrate, authorized to administer oaths, in pursuance of the regulation or in conformity with a usage of the Treasury Department, under which the affidavit would be admissible evidence at the department in support of a claim against the United States, and perjury may be assigned thereon.'"

No such statement can be found in the Bailey case.

How any person could read the Bailey case, misunderstand it, and misquote in this way, we fail to see. The case expressly holds that no attempt is made to assign perjury, but to convict of the statutory offense of false swearing. Note the language of the syllabus, first paragraph:

> "Indictment for false swearing under the third section of the Act of Congress of March 3rd, 1823, which declares

that 'any person who shall swear or affirm falsely touching the expenditure of public money, or in support of any claim against the United States, shall suffer as for willful and corrupt perjury.'"

The statute uses the word perjury to indicate the punishment that shall be meted out for false swearing, but does not say that the person shall be guilty of perjury who swears falsely. Further on in the syllabus it is said:

"*The act of* 1823 *does not create or punish the crime of perjury, technically considered.* But it creates a new and substantial (substantive) offense of false swearing and punishes it in the same manner as perjury. The oath, therefore, need not be administered in a judicial proceeding, or in a case in which the state magistrate under the state laws had jurisdiction so as to make the false swearing perjury. It would be sufficient that it might be lawfully administered by the magistrate and was not in violation of his official duty."

Again, to follow the language of the syllabus, it is said:

"The language of the Act of 1823 should be construed with reference to the usages of the Treasury Department. The false swearing and false affirmation referred to in the act ought to be construed to include all cases of swearing and affirmation required by the practice of the department in regard to the expenditure of public money, or in support of any claims against the United States. The language of the act is sufficiently broad to include all such cases, and there is no reason for excepting them from the words, as they are within the policy of the act and the mischief to be remedied. The act does no more than to change a common-law offense into a statute offense."

As we have seen, it was a common-law offense to support a claim against the government by false swearing, even though the oath was administered beyond the seas, and even though the one so falsely swearing did not commit perjury.

In perjury cases there are two questions. Is the case in

which the perjury is alleged to have been committed a case in which a law of the United States authorizes the administration of a oath; and, second, was the oath administered before a competent officer or tribunal? The statute itself does not prescribe how the competency of the officer or tribunal is to be determined. That is, it does not say whether his competency must be based upon a law of the United States or upon something else; but in deciding the other question it is absolutely essential to know whether the case in which the alleged perjury was committed is a case in which a law of the United States authorizes the administration of the oath.

We do not have access to the case of Prather vs. United States, Appeal Cases, District of Columbia, 82, cited by defendant in error on page 69 of his brief, but we understand that it is governed by the rules announced *In Re Kollock, supra.* If so, the law describes the offense and provides a penalty.

The case of Ralph against United States has not been followed by subsequent decisions, nor do we think the reasoning of Judge Deady has been. No authority is cited in the opinion in support of the Ralph case, and Judge Deady in citing one authority in support of his opinion, perhaps the authority from which he derived his opinion, shows he totally misunderstood the authority cited.

We again call the Court's attention to the case of United States against Bedgood, 49 Fed. 54. Defendant in this case was charged with perjury in final proof in her pre-emption entry. The proof was made agreeably to regulations promulgated by the Secretary of the Interior. Commencing at the bottom of page 58, the judge deciding the case says:

"Congress having expressly declared what officers are authorized to take the affidavits and administer the oaths required by law in pre-emption entries, and having expressly prescribed what statements or affidavit of the pre-emptionist shall contain, neither the Commissioner nor the Secretary has the legal authority to designate other officers before whom such oaths may be taken, or to prescribe oaths to the existence of other facts than those required by statute. The law makes the existence of certain facts and oath thereof the only prerequisite to demanding a particular right, and oath of other facts in connection therewith, however false, is not perjury."

In the case on trial the law made the proof of certain facts prerequisite to demanding a particular right. The Commissioner of the General Land Office prescribed that other facts must be proved as prerequisites to demandingthat right, and under the authorities no one could be convicted of swearing faalsely to the other facts so prescribed by the Commissioner of the General and Office.

On page 58 the judge rendering the opinion states the contention being made by counsel for the United States in the following language:

"But it is contended by the United States Attorney that, if said Act of 1857 is repealed, the Commissioner of the General Land Office has authority to designate by regulations before or by what officers such an oath may be taken, and, I understand, contends that the Commissioner is authorized to designate the character of the oath and the matters to be sworn to. Under the authorities already cited we have seen that perjury cannot be assigned on any such oath."

We call the Court's attention to the cases cited in support of this opinion and to the holding of the judge on page 56 that the indictment was uncertain.

We cite United States against Howard, 37 Fed., p. 666. This

was an indictment under Section 5392, and the defendant was charged with swearing falsely in attempt to commute his homestead entry. The Court says on page 668:

> "The matter on which perjury is assigned grew out of an affidavit made by the defendant on his application for a commutation of his homestead entry under Section 2301, Revised Statutes. The statements sworn to, and which are alleged to be false in the indictment, are not the statements required or authorized by law to be made in the affidavit of an applicant for a pre-emption homestead or homestead commutation entry.
>
> "Perjury cannot be predicated upon them, however false they may be."

We think it is safe to concur in the opinion of Judge Hanford, as stated in United States vs. Manion, to the effect that law is a rule prescribed by the supreme power in a nation; that the Commissioner of the General Land Office is not the supreme power of the United States, and that, while he may exact from all who transact business before him and in the district land offices compliance with the rules and regulations which he is authorized to make, he cannot prescribe a rule which can have the force of a law of the United States, so that one, failing to do the things by it commanded, or doing the things by it prescribed, is guilty of a crime.

At least four of the District Judges for the Ninth Circuit have made decisions of such a nature that it is certain they would uphold our contention to the effect that it is not perjury to take a wilful false oath concerning matters which are required to be proved at the time of final proof of a timber claim only by a regulation of the department. Each of these judges is qualified under the law to sit in this Court, and we submit their opinions are entitled to serious consideration.

We now pass to the discussion of the question of whether or not the regulation providing for the proof of matters other than those provided for by statute at the time of final proof is one that it was proper for the Commissioner of the General Land Office to make.

It will be observed that many of the cases cited by us concede that the regulation, the subject of discussion in such cases, was one proper to be made, and yet that such regulations, although reasonable, and within the authority of the head of a department to make, were not laws of the United States within the meaning of that phrase as used in criminal statutes.

We further insist that the regulation now the subject of discussion is not only not a law of the United States, but that it is not one the Commissioner of the General Land Office had a right to make for any purpose.

A head of a department cannot by regulation add to the statute.

See Morrill vs. Jones, 106 U. S. 466, 27 L. Ed. 267.

We insist that the case of Adams vs. Church, 193 U. S. 510, is conclusive and controlling that a timber land applicant has a perfect right to contract for the sale of the land *when he gets a patent*, at any time after the filing of his original sworn statement or application required by law, and therefore the attempt of the Land Department to require him to swear at the time *of his final proof* that he had not sold the land or contracted it away *between the time of the application and the final proof* was not a "*regulation for the carrying out of the law*," but was inconsistent with the law, and an attempt to usurp the functions

of the legislature and the judiciary, and to add something to the law, which Congress had never intended to, and did not intend to require.

Up to the time of Adams vs. Church, it must be remembered, there had been no occasion for the highest court to pass directly upon the question as to whether a party had a right to contract for the sale of the land before final certificate, either under the *timber culture*, or timber and stone legislation. Previous to this decision, there had been an occasional dictum of the courts in relation to the matter which might be construed one way or another, according to the inclination of the parties, but this was the first time that either of the laws had been *authoritatively passed upon*, and in that decision the Court held that as to the *timber culture* act, it was perfectly lawful for the claimant to contract away his land at any time after the original affidavit was filed placing it upon the ground that,

> "*Had Congress intended a different result to follow from the alienation in good faith, it would have so declared in the law.* To sustain the contentions of defendant in error would be to incorporate by judicial decision positively against the alienation of an interest in land not found in the statute or required by the policy of the law upon the subject,"

And distinguishing the timber culture from the homestead proof on the ground that the law requires in the homestead case an affidavit, at the time of the final proof, "that no part of such land had been alienated except as provided, etc.," and that no such requirement was involved in the timber culture act.

So that unless the two laws can be successfully distinguished, the Adams-Church case is entirely conclusive upon this point.

Can they be distinguished? A labored but ingenious attempt to make such a distinction is presented in the brief of the learned attorneys for the government, but we must submit that there is absolutely no distinction between the two acts in this respect. Each of the laws requires the person applying for the land, at the time of his application to make an affidavit that he makes the application "in good faith, and not for the purpose of speculation, or directly or indirectly for the uses or benefit of any person or persons whomsoever," and in the *timber culture* act that "*they intend to hold* and cultivate the land, and to fully comply with the provisions of said act," and neither of the acts require any *affidavit of non-alienation, express or implied, at the time of final proof.* The only requirements of the timber culture act at the time of final proof being that the applicant shall

> "Prove by two credible witnesses that he, or she, or they, have planted for not less than eight years, have cultivated and protected such trees as aforesaid."

And the timber and stone act requiring only that the applicant shall furnish to the Register of the Land Office satisfactory evidence

> "That satisfactory notice of the application presented to the Register as aforesaid was duly published in a newspaper as herein required. Secondly, that the land is of the character contemplated in this act, unoccupied and without improvements other than those excepted, either mining or agriculture, and that it apparently contains no valuable deposits of coal, silver cinnabar or coal."

This is the complete requirement of the law at the time of making final proof. There is no non-alienation clause whatever, and no affidavit required that the party has not contracted the land away since the making of his application.

Apply to this the language of the Supreme Court in the Adams-Church case:

> "The policy of the government *to require such an affidavit* when it intends to make it a condition precedent to the granting of title was indicated in the homestead act, and could readily have been pursued by a similar provision in the timber culture act if it was intended to extend the principle to that statute. The final proof under the latter act has in view sworn testimony that the number of trees required has been planted, etc."

And again:

> *"Had Congress intended such a result to follow from the alienation of an interest after entry in good faith, it would have so declared in the law."*

When we remember that there is no requirement for any proof of non-alienation whatever at the time of final proof in the one case or in the other, nor any showing required at that time that the party still desired the land for his own exclusive use and benefit, is it not clear that there can absolutely be no distinction between the two?

It is contended that there is something distinctive in this regard in the policies of the act, but we submit that this is not the case.

There is, indeed, far more, tending to show a disposition on the part of Congress to limit the power of the applicant to deal with the land before final proof, and far more of a disposition to make the *gift a personal one* in the *timber culture* act than in the timber and stone act.

In the timber and stone act there is *nothing whatever* to show that Congress desired to limit the power of the claimant in transferring his right *after the original application;* and, indeed, as we shall presently see, there would be but little reason for such limitation.

In the timber culture act, on the contrary, there are many provisions which might be construed as suggesting an intention to make such a limitation.

In both cases the law provides that no person shall make more than one entry of one-quarter section under the act. (See Section 1 of timber culture act. Section 1, timber and stone act.)

So that in this respect the acts are exactly on a parity, the right of acquirement being limited in each case in exactly the same way.

But the timber culture act requires "*the party making an entry* to break five acres the first year and five acres the second year, etc.;" and it also contains a provision "that *no final certificate shall be given*, or patent issued, for the land so entered until the expiration of eight years from the date of such entry, etc." Again, Section 3 of that act provides "that if at any time after the filing of such affidavit, and prior to issue of patent, for said land, the *claimant* shall fail to comply with any of the provisions of this act, then in that event *such land shall be subject to entry under the homestead laws*, etc.;" and Section 4 pro-

vides "that no land acquired under the provisions of this act shall in any event become liable to the satisfaction of any debt or debts contracted prior to the issuing of the final certificate therefor."

Now, it is submitted that these provisions are strongly suggestive that it was the intention of Congress to keep a *timber culture* claim in the hands of the original applicant up to the time of issuing the final certificate, which could only be at the end of the eight years.

And the fact that the Supreme Court refused to so construe it, or to limit the power of the applicant to contract away his right in the face of these strong provisions, shows how reluctant that high court is to create any limitation by judicial construction, or to apply such supposed limitation, a single day *beyond the time actually fixed by Congress;* and it also shows how plainly and clearly *Congress must express its intention* before the courts will give effect to such a limitation.

There are no such limiting provisions *after the filing of the original application* in the timber and stone act; no provision for any non-alienation clause at the time of final proof. Nothing whatever to limit the right of a claimant or to show that it was the intention of Congress that his right to deal with the land, in so far as his claim went, was limited in any manner or made personal to him at any time after his first filing.

In this act, as in the timber culture act, Congress saw fit to provide explicitly just what the claimant *should* prove at the time of his final proof, and there is not a word *about non-alienation whatever*—nothing expressed, and absolutely nothing from

which any such intention could be implied; and if it is put there, it must be put there, we submit, by judicial legislation absolutely independent of any act of Congress.

There is much said in the brief of the learned attorneys for the defendant in error about the use of the word "entry" and the word "purchase," and an able argument is made to show that it was the intention of Congress that the land should be *sold* to the original claimant, and that he does not get a vested interest and is not entitled to a patent until he has made his final proof.

But we submit that all this is immaterial; it is ingenious, mayhap, but nothing more.

We do not contend that the sale to the claimant was completed until he had made final proof and paid his money. Neither do we contend that the government was bound to, or even could under the law, permit some other person than the claimant to complete the purchase of the original applicant and take patent directly to himself for the land. It is not necessary for our case to so contend. Neither could the purchaser from the original claimant get the patent in that way under the *timber culture* law, construed by the Supreme Court in the 193 U. S., because in both cases *the sale must be made and the patent issued to the original applicant.* This is perfectly clear as to the timber culture law from the very terms of that law, which we have already quoted, and which requires the patent to be issued to the claimant; and yet the Court says in the Adams case, "that there was nothing inconsistent with the law, because he had 'agreed to convey an interest *to be conveyed' after patent issued.*"

In both cases it is perfectly clear that the claimant must *himself* comply with the law, and that the final receipt and patent must be issued *to him*. It cannot in any case be issued to anyone else. The question is not whether the government can be compelled to patent the land to someone else than the purchaser, but whether there is anything *unlawful* in the making *a contract to convey* after the applicant does get patent, and at what time it becomes lawful for him to do so.

It is idle to discuss the question of when, under either act, an applicant gets a vested interest in the land, as that is obviously collateral to the real question. There can be no question but what each party gets some kind of an interest from the time of his original application. It is absurd to suppose that the government would permit, or that it could *justly* permit, some other person to file on the land after the timber applicant (if his filing was valid) had filed upon the land and paid the filing fees to the land officials and proceeded to the expenses of publishing the notice, etc., even before final proof. In either case, if he fails to comply with th law he loses the land and it becomes at once subject to other claims. (This is by the express provisions of the timber culture act.) *In neither case is the final receipt to be given until the conditions on the part of the applicant have been entirely complied with.*

Even if Congress can take the land away from a valid applicant under either act, that will not affect the question. Of course, in such an event the purchaser before final certificate would get nothing by his purchase. And, of course, in either event if the claimant *did not comply with the law* the purchaser would get nothing. But that would not make the transaction *unlawful*, any more than any purchase between private individ

uals would be unlawful, because the title to the article purchased was contingent and might ultimately fail.

But it is said that the provisions of the timber culture act are "intended to benefit the government and the public generally as much as the applicant," and there is an attempt to show that this is not true of a purchase under the timber and stone act. But we submit that this distinction is absolutely without foundation. Who can say that the government, or the public through the government, is less benefited by the receipt of the $400 in cash than it is by the growing of forty acres of timber on a man's own private land?

Indeed, in the latter case the benefit to the government or to the public is very remote. The land upon which the timber grows is absolutely that of the claimant; the government has no interest whatever in the timber. The government cannot take from it even so much as a match or a toothpick, and unless it happens to be along some public road the traveler or any member of the public has no right to even lay his head in the shadow of a tree. The only benefit to the government or public is the remote and perhaps fanciful one of beautifying and developing the country. Who can say, at any rate, that this is, or has been, of more benefit to the public or to the government than the vast sums received from the sale of timber lands at the rate of $400 for each quarter section?

Besides the buying of this timber land and the ultimate conversion of its products into lumber, and ultimately into fences, barns and homes, in city and country, is, itself, a development of the country. At any rate, as great as any that has been re-

ceived or could be expected from the growth of isolated groves upon prairie lands.

It is said that the price of $2.50 per acre is but a small part of the value of timber lands. Even if it were, it would not be material upon the question involved. But it was not a "small part" of the value of these timber lands *at the time the timber land act was passed.*

On the contrary, it was probably the *full value* at that time, in nearly all localities, and for years and years and years the timber remained untouched at that price per acre, until the subsequent development of the country, the building of railroads, etc., brought the different sections of the country closer together and multiplied the value of these lands. The act should be construed with reference to the conditions at the time it passed, and not with reference to present values.

It is said that "it is inconceivable that Congress intended to permit a person to sell his privilege to purchase before he had acquired any vested interest in the land." We are not contending that he had a right to *sell his privilege.* He probably could not do that, as we have seen, under the timber culture act, or under the timber and stone act, because in both acts the final certificate and patent must run to him; but it is not "inconceivable" that Congress should intend, under either act, to leave him to contract as he pleased in relation to the *subsequent* disposal of the land. The purchaser in both cases, of course, taking his chances of the title being perfected according to law.

Why is this particular sixty days between the original filing and the final proof to be deemed so inconceivably precious and important? Why is it entirely "conceivable" that Congress intended that he should have full power to dispose of the land if he saw fit *the moment that he made final proof,* and inconceivable that it so intended after he had *filed?* And why is that sixty days any more important than any other period of time as a supposed check upon fraud? If Congress wanted to limit the disposal of the property and keep it in the hands of the first purchaser, why should it not make a five-year limit, as in the homestead law, or a one-year limit, or a six-months' limit? And why did it not have a right to make the limit *wherever it saw fit?*

It did have that right, and one limit will be as reasonable as the other. Congress, we submit, had the perfect right to fix the time up to which a party must not contract for the subsequent sale of his right. The limit was perfectly arbitrary, and one was as reasonable as another; or at least different minds might differ as to which was the more reasonable. *And Congress did fix that time by requiring an affidavit to that effect at the time of the original application, and at no other time.*

It was evidently not the intention of Congress, as construed by the Supreme Court, to hold these timber lands indefinitely in first hands. Indeed, such a provision would have entirely defeated the purpose of the act, which was, no doubt, the development of the country, because no one man, with a single 160 acres of land, could construct sawmills, build roads and make the products of the timber available. Therefore, the govern-

ment, while giving the individual the benefit of the purchase in the first instance, would not see fit to limit very closely the right of the claimant to contract in relation to the land, but would limit it only so that the *original filing* must be in the applicant's own behalf. When the filing had once been made in good faith by the original applicant, with the intention of getting the profit to himself, it made little difference to the government whether he contracted the land to a purchaser *at once, or sixty days afterwards*, provided he complied with the law and paid the government for the land.

It must be remembered in construing this law that it passed Congress at a time when there was no other way for corporations or individuals, engaged in the manufacture of lumber, to obtain timber from the government, except from the repurchase of timber land claims taken under this law.

There was then no "reserve" system, and no provision for the sale of government timber.

It must then have been the expectation, and it was probably the intention, of Congress that many of these claims would pass speedily into the hands of companies engaged in the sawmilling business. Otherwise, the country could not be developed, or towns, villages and cities built.

We submit, then, that there is absolutely no principle of public policy—nothing in the general policy of the laws, and certainly nothing in the language of the acts themselves—upon which any distinction can be made between the "Timber and

Stone Act" and the "Timber Culture Act," as construed in Adams vs. Church, and that case, with the principles announced therein and the reasoning stated for the decision, is absolutely conclusive that the limit upon a man's authority to contract in relation to his timber claim, as he would in relation to other property, does not extend beyond the time when the non-alienation affidavit, required by Congress, is to be made and filed, and that after that he has a perfect right to contract in relation to the land as he sees fit, subject, of course, to the qualification which exists in both of these acts: that if he does not comply with the law and obtain title from the government, the party to whom he contracted gets nothing.

There is nothing whatever in the provision that the land shall not be sold to any one person or association of persons in quantities exceeding 160 acres. Exactly the same intention is clearly expressed in the timber culture law, construed in Adams vs. Church. In both cases the *sale* was limited to 160 acres to each person. In neither case could that sale be said to be complete until the purchase price, in money or services, had been paid and the patent issued. And in both cases, as we have seen, the patent must ultimately issue to the claimant to whom alone the land is sold by the government. But it does not follow in either case that because the land can only be "sold" to individuals, that, therefore, the individual cannot contract in relation to the subsequent disposal of it until the sale is complete. In both cases it clearly requires something else than the mere limitation upon the amount to be purchased by one individual to narrow his right to contract in relation to the disposal of that one purchase.

This limitation is expressed in the homestead act by the affi-

davit of non-alienation at the time of *final proof*, and it is expressed in the timber and stone act, and in the timber culture act, by requiring a like affidavit *at the time of the original filing*.

It is said, in the brief of defendant in error, that

> "The law contemplates, however, that every person *who has sufficient means with which to purchase* 160 *acres of timber land, * * * * or who is able to borrow money with which to make such purchase*, will be able to retain the ownership thereof until he has been offered and received at least the then market price of that land, etc."

If this means anything, it means that the law was intended not for the poorer classes who need the bounty of the government most, but only for those with credit or means. But we see no reason for such distinction or construction, and no reason to suppose that Congress did not intend that any person, however poor, who might find a desirable piece of timber land lying open, might not file upon the same for his own benefit, as required by law, and afterwards be permitted to make any arrangement he could compass by which he could get the necessary funds to make his final proof. And we see no reason to suppose that Congress, while intending to allow free disposal of land, when once taken, should put the limit of that free disposal, at such a time, as would allow the man of means to complete the purchase and immediately do with the land as he saw fit, and at the same time to put the limit so far back that his equally honest neighbor, who wanted the land for the same purpose, but was unfortunate enough to have no means or credit at all, could not have the benefit of any timber purchase whatever.

We think it more consonant with the spirit which our gov-

ernment has always manifested to suppose that the law was intended for the special benefit of the very poor, at least as much as for any other class; and probably this was the reason why Congress placed the limit *at the filing*, and not at the final proof, and after the money had actually been paid. So that even a very poor man, if he actually wanted to file upon the land for his own benefit, might have a free hand in arranging about the disposal of it after he had filed, so as to get the money with which to complete his purchase, and thereby derive his share of the benefitts from the bounty of the government, which he could not for lack of means otherwise possibly derive.

Much is claimed in the brief of the learned attorneys for the government from the case of Budd vs. United States; and there are some intimations in that opinion which, were it not for the subsequent case of Adams vs. Church, might seem to support their contentions.

But it must be remembered that this question was in no way presented or involved i nthe Budd case, and there is no rule, perhaps, of more frequent application than the one which limits the effect of a decision of a court to matters *involved in the case under consideration.*

In the Budd case, then, *there was no question whatever as to the effect of an agreement made between the time of filing and the time of final proof.* In that case the land in question was conveyed *after final proof,* and there was no contention that there was a contract to convey between the time of filing and

the time of making final proof. Therefore, the effect of such an agreement was not before the Court. It was not presented, probably, by the argument of counsel, and it probably (since it was not involved in the case) received no careful attention at the hands of the Court. If the Court assumed, as is contended, that a party could not contract in relation to his claim after filing, and before final proof, it was not a deliberate decision of the Court upon that point, and presumably was not intended so to be, because, as we have seen, that question was in no way involved, and the Court was not required to give it any careful attention, because the question then being presented was, not whether a contract *before* final proof would make the claim unlawful, but whether a contract made *after* such final proof would have that effect.

And the Court finding that the contract there in question was *not* invalid, it became unnecessary to inquire as to what would have been the effect of a contract made between the date of filing and the date of final proof. We submit, therefore, that if there is any language in that opinion supporting the position of the government, in this case it must be held to be the mere expression of the individual views of the learned judge who wrote the opinion upon a question not involved, and, therefore, not based upon argument or a careful investigation.

If this were otherwise, the case could not have *escaped the attention of the Court* in the subsequent case of Adams vs. Church, which, as we have already shown, is entirely inconsistent with the construction of the Budd case now contended for by the learned attorney for the government, and which would

necessarily overrule the former case, if that was intended as a decision, upon the question here involved.

REPLY TO SUPPLEMENTAL BRIEF OF DEFENDANT IN ERROR.

GOVERNMENT'S CLAIM THAT ERRORS IN EVIDENCE SHOULD NOT BE CONSIDERED BECAUSE (as is alleged) THE PAGES OF THE RECORD ARE NOT REFERRED TO IN THE ORIGINAL BRIEF OF THE PLAINTIFFS IN ERROR.

To show how little foundation there is for this contention, it is only necessary to ask the Court to examine the copies of the briefs prepared for the use of the judges. It will be found that the pages of the record relied upon are carefully pointed out.

It is true that this was not done at the time these briefs were originally served and filed, as required by the rules, because this was a physical impossibility under the circumstances of the case.

At the time the case was set down for hearing the record had not been printed, and *it had not been printed* at the time when the limit of time allowed by the rules for plaintiffs in error to file their brief expired.

It was utterly impossible, therefore, for the plaintiffs in error to file their brief within the time fixed by the rules of the Court, and at the same time point out therein the pages of the printed record, because the record had not yet been printed and the pages were unknown.

It will also be remembered that, in view of these facts, the plaintiffs in error appeared before this Court at its term in Portland and asked for an extension of time in which to file their briefs, both because of the impossibility of complying technically with the rule, and also because they had not sufficient time to properly prepare their brief.

This application was resisted on the part of the District Attorney and denied by the Court.

One of the grounds urged by the District Attorney against this extension, as the Court will remember, was that the pages of the record could be left blank and the copies filed with the Court, could be filled in after the record was completed. This was actually done, and the copies of the brief in the hands of the Court will show the pages fully filled in, so that the Court will not be under the necessity of wading through the whole record, as suggested in the supplemental brief.

The only thing, therefore, that could be urged in this behalf by the government is that this paging was not done technically within the time *fixed by the rules of the Court;* and we submit to the Court that the learned attorneys for the government are not in a very graceful position to raise this question, in view of the fact that *their brief was not filed within the rules at all.*

In the first place, their brief was not filed within three days before the case was called for hearing, as required by the rules. Then, *after the time had expired,* they applied to the Court for twenty days' extension of time after the hearing. This was allowed, and then, afterwards, two other extensions were taken, extending the time until ————————; and even then no brief was filed within either of these orders, nor was any filed or served until about the 9th day of January, 1907, when a brief was filed purporting to be a complete brief, and not until about the 19th day of January was the last volume or supplemental brief filed and served.

We think, therefore, that in view of these facts, the attorneys for the government are not in a position to raise so narrow a technical question. The filling in of the pages referred to in the record was a physical impossibility at the time of the original filing of the briefs of the plaintiffs in error; and if we might be permitted to say it, it seems to us to show the desperate condition of the case of the attorneys for the government in their own estimation, when they are seeking to foreclose the plaintiffs from a hearing thereon, upon grounds so narrow in themselves and resting upon so slight a foundation.

EXCEPTIONS TO THE EVIDENCE FULLY SAVED.

Another attempt to prevent the Court from passing upon the question of whether or not the defendants in the Court below

were tried in accordance with the rules of law, upon purely technical grounds, is based upon the claim that their objections were not sufficiently formal.

In order to sustain this narrow position, the government passes over the *statements of the exceptions themselves*, which were intended to and did state the objections, ruling of the Court, and exception, as required by the rules of this Court and the practice at common law; and bases their objection upon what purports to be a mere detailed statement of the *testimony of the witness* in question, which does not purport to disclose the details of the rulings and exceptions.

The statement of each particular exception relied upon did not "creep" into the record. It was placed there openly and above board, and under such circumstances that there could be no mistake; and it was placed there *because it was the truth and the fact*, at a time when the whole matter was fresh in the recollection of the attorneys and the Court. The proposed Bill of Exceptions was fully presented to the attorneys for the government in Court below, as is shown by the record, and they were given every opportunity to correct any errors if there were any.

The statement of these objections and exceptions of the different witnesses are as follows:

Of the witness Feuerhelm:

"Q. Now, at the time you filed this paper—signed it—

what was your intention as to what you were going to do with the land when you got title to it?" *To which the defendants objected as incompetent and immaterial, and not in any way binding upon the defendants,* but the objection was overruled, *to which ruling the defendants excepted,* and the witness answered: "Well, I thought it should go to Gesner," and thereupon the final proof papers of said witness were offered and admitted in evidence over the objection of the defendants, as in similar cases hereinbefore referred to. Said witness was also asked by the government the following question: "What was your understanding when you left Gesner and when you filed on a claim as to whether you had promised that you would let him have it when you got the title?"

"A. Well, there was no real promising."

"Q. You didn't say that?"

"A. No, sir."

"Q. But what was your understanding as to what he believed, and what *do* you believe?" *To which the defendants objected as incompetent and immaterial, calling for a conclusion of the witness, and not binding upon the defendants;* but the objection was overruled, and *the defendants excepted and their exception was allowed,* and the witness answered: "I believed nothing else, but I went in to file on the claim." Thereafter the witness was asked the question: "At the time you filed, did you intend to let Dr. Gesner have the land when you got the title—at the time you were signing that paper—filing?" *To which the defendants objected as incompetent and immaterial, calling for a conclusion of the witness, and not binding upon the defendants;* but the objection was overruled, and the defendants excepted, whereupon the witness answered, "I guess I thought so."

See printed record, pages 515 and 516.

As to the witness Calavan, they were as follows:

Whereupon the witness was asked: "Q. What was your understanding at the time as to what the terms were upon which you were taking it up?" *To which the defendants and each of them separately objected as calling for a conclusion of the wit-*

ness and incompetent, and not binding upon said defendants in any way; but the objection was overruled by the Court, *to which ruling each defendant then and there excepted,* and the witness answered: "Why, I understood that I was to receive $500 for the same when patent issued." And thereafter the further question was asked of the said witness: "Q. And was it your intention at the time you were making that filing to convey it for the $500 as soon as you did get patent, or what was your intention in respect to it?" *To which each of the defendants then and there objected, upon the ground that it called for a conclusion of the witness and was incompetent, and not binding on said defendant* in any way; and thereupon the objection as to each defendant was overruled, *and each defendant then and there* excepted to the ruling, and the witness answered: "My intention was to convey it to them when I got patent."

See printed record, pages 351 and 352.

So the record as to the witness Crain:

"Q. What was your understanding as to whether you had promised to do that or not?" *To this defendants objected and the Court ruled that he might state his belief, to which ruling the defendants then and there excepted, and their exception was allowed,* and the question was then asked: "Well, what did you believe?" *To which the defendants objected as incompetent and immaterial, and not binding in any way upon the defendants;* but the objection was overruled, and the defendants excepted, and their exception was allowed, whereupon the witness answered: "Well, I would have felt that way if I had went ahead and proved up on the land, and they had furnished me the money to do it with." Whereupon the witness was asked the following question: "What was your understanding of it?" To which the defendants objected, being a leading question and calling for the understanding of the witness; but the objection was overruled, and the defendants excepted, and their exception was allowed, whereupon said witness answered: "Yes, sir."

See printed record, pages 388 and 389.

And as to the witness Hudson:

"Q. What was your intention as to what you would do with the land at the time you signed that?" *To which the defendants objected as incompetent and immaterial, and in no way binding upon the defendants;* but the objection was overruled, and *the defendants excepted, and their exception was allowed.*. Whereupon the witness answered: "A. Well, I was going to sell it, of course, if I could; I took it up for speculation." "Q. Sell it to whom?" "A. Well, I was going to sell it to the highest bidder. I was calculating to make a thousand dollars out of it." "Q. What did you understand at that particular time as to whether you had agreed to sell it to Gesner or not?" Mr. Bennett—"We object to that, your honor." Objection overruled. Defendants except. "A. Well, now, I don't know; it was kind of an agreement—a verbal one, though."

This is the record in the case, signed and sealed by the Court, and it is as useless, as it is without foundation, for the defendant in error to attempt to claim that these prominent statements in the proper place in the very body of the Bill of Exceptions "crept" into the record, or got there by any subterfuge or by any underhand way.

And since the defendants in error have seen fit to set up the claim that the record is not correct, and to go outside thereof, it is proper, perhaps, for us to state the facts as to the real manner in which the Bill of Exceptions was prepared.

As originally presented, the Bill of Exceptions was comparatively short, the plaintiff in error seeking to limit the exorbitant expenses of making up the transcript and printing the record (in this case these expenses have amounted to about $2,500), and for this purpose the bill was presented in the manner which

has been so often approved by this Court, by simply stating the objection, ruling and exception, and enough of the preceeding facts so that the Court might understand how the question arose. The proposed Bill of Exceptions, therefore, contained nothing except the brief general statement and the preliminary matter, now appearing in the record as to each of these witnesses, and the portion of which, bearing upon the particular question, has just been quoted in each case.

It will be seen, therefore, that the manner of stating these objections and exceptions was very prominent, and constituted, indeed, almost the whole of the Bill of Exceptions as originally presented, and *everything there was in the proposed Bill of Exceptions in relation to the questions involved.* Being so often repeated and in so prominent a form, it could not possibly have escaped the observation of the learned attorneys for the government.

When the matter came up for hearing before the Court the proposed bill was objected to, not because these exceptions had not been taken as a matter of fact (which they had been in every instance), or because they were not properly stated, but because it was thought and urged that there was not *sufficient explanation of the way in which the questions arose.* And the Court intimated that where the objection and exception were taken to any part of the evidence of a witness, the whole of the evidence of that witness, both direct and cross-examination, should be inserted as throwing light upon the questions involved. And thereupon the plaintiffs in error was required to and did amend their

Bill of Exceptions by adding to the statement previously made the full *testimony* of such witness, and this was done as it now appears in the record.

In doing this a transcript, which had been prepared by a reporter, was followed for convenience in copying, and more or less of the rulings and exceptions and discussion back and forth were presented therewith. This transcript, however, does not purport to present in detail all of the discussions or rulings of the Court, and was not intended so to do, but simply *the evidence of the witness.*

As matter of fact, in order to expedite the trial, and sometimes at the suggestion of the counsel and sometimes at the suggestion of the Court, the objections and exceptions were not always repeated as to each particular question; but when a question of any kind first came up a full objection would be made, a ruling taken and exception allowed, and then an understanding was had with the Court that the same objection, ruling and exception should go to every similar question through the case, without repeating it *in extenso* each time, and that when the record was made up the objections and exceptions so taken should appear therein. In making out the transcript, the reporter (who, by the way, was not the official reporter, but one employed by defendants) sometimes transcribed these colloquies between the Court and counsel in full, sometimes partially, and sometimes not at all.

At the time the bill of exceptions was settled, the matter was fresh in the minds of the Court and counsel. The Court knew that these exceptions were all fully taken. Indeed, the Court was sometimes impatient because counsel for the defendants, fear-

ing that there might be some misunderstanding, and to avoid any possibility of it, would repeat objections, as the Court thought, unnecessarily.

We do not understand that there is any particular form of words in which objections or exceptions must be stated. It is enough if the Court understand that an objection was intended, and the grounds thereof, however that intention may be conveyed to the Court.

Thwing vs. Clifford, 136 Mass. 482.
Leyland vs. Pingree, 134 Mass. 370.

So, when an objection has been once fully made and brought to the understanding of the Court as to a certain class of testimony, it is not necessary to delay the trial and annoy the court by repeating the objection in all its details every time a similar question is asked. On the contrary, it is perfectly proper to have an understanding with the Court that the objection and exception, once taken, shall go to all similar testimony, and that the exception shall be formally extended in the bill when settled.

This has always been the practice, we think, in all the Courts, and it saves expense and delay in the trial of the case, and unseemly interruption and annoyance to both Court and counsel.

That these exceptions were taken in some form is conclusive

from the statements in the Bill of Exceptions, to which we have already referred.

The Court knew perfectly well that it was the intention of the defendants to object and except to all these rulings, and assented to the manner in which the objections were taken.

To have refused to state these exceptions upon the ground that they were not formally taken and renewed to each question, after giving counsel to understand that they might be taken in that way, would have been an injustice which could never be expected of any Court.

That it is perfectly proper to take exceptions in this way is sustained by an overwhelming line of authorities.

Graves vs. People, 18 Cal. 170, 32 Pac. 66.
Gilpin vs. Gilpin, 12 Col. 504, 21 Pac. 612.
Stevenson vs. Waltman, 81 Mich. 200, 45 N. W. 825.
Pfeil vs. Kemper, 3 Wis. 287.
Sharon vs. Sharon, 79 Cal. 633, 22 Pac. 26.
Wolf vs. Smith, 36 Iowa 454.
Dilliber vs. Home Life Insurance Co., 69 N. Y. 260.
Carlson vs. Walderson, 147 N. Y. 652.

In Leyland vs. Pingree, supra, Chief Justice Morton, delivering the opinion of the Court, says:

> "The form in which exceptions are saved is of no consequence. If expressly saved, of course they must be allowed.

It very often happens in trials that counsel and the judge understand that the purpose of the counsel is to save exceptions, although not alleged in express language. Whatever form may be used, if the counsel and the judge both understand that exceptions are saved, the judge may, and should, allow such exceptions under the rule."

And in Thwing vs. Clifford, supra, the same Court says:

"No particular form in alleging and saving exceptions is required. If the Court understands that counsel except to a ruling, or refusal to rule, a refusal of instructions, or instructions given to a jury, it is sufficient. Leyland vs. Pingree, 134 Mass. 367. The danger in not taking an exception expressly and formally is that the judge may not understand that counsel intends to except, and thus the exception be lost. *"In the present case, we must assume, from the fact that the judge allowed the exceptions, that he understood the counsel of the defendant excepted* to his refusaal to instruct the jury as requested, and to the instruction given."

Again in Delliber vs. Home Life Insurance Co., supra, it is said, Earl, Judge, delivering the opinion of the Supreme Court of New York:

"When upon a trial an objection has once been distinctly made and overruled, it need not be repeated to the same class of evidence. The rule in such cases has been laid down, and should be observed in the further progress of the trial, without further vexing the Court with useless objections and exceptions."

And in Graves vs. People, 18 Col. 170, cited above, the Court says:

"A constant repetition of the same objection would have unnecessarily delayed the trial, and might have prejudiced the defendant's cause before the jury. When a certain class of evidence is offered, such objection as counsel have to its admission should be fully stated. After this has been done, and the objection argued, overruled and the evidence received,

the attention of the Court again called to its objectionable character by a motion to strike out the evidence, and exceptions to the adverse rulings duly taken, as in this case, counsel may well desist from renewing fruitless objections."

We submit that the matter requires no further comment. That under the record it must be presumed (as it was in fact) to have been carefully examined and passed upon, both by the attorneys for the government and the Court, and that the objections and exceptions were fully taken in a careful and timely manner.

And this brings us to the merits of the question, as to WHETHER THE COURT ERRED IN PERMITTING THE GOVERNMENT TO PROVE THAT THERE WAS A CONTRACT BETWEEN GESNER AND THE DIFFERENT APPLICANTS, NOT BY PRESENTING THE FACTS AS TO WHAT WAS ACTUALLY SAID AND DONE, BUT BY PERMITTING THESE APPLICANTS TO STATE *WHAT THEIR UNDERSTANDING OF THE TRANSACTION*, AND THEIR *UNDISCLOSED INTENTIONS* IN RELATION TO THE DISPOSAL OF THE LAND, WAS.

At the outset it is proper to advert to the fact that there is no attempt in the brief of the defendant in error to distinguish the authorities cited on this point on pages 90, 91 and 92 of the original brief of the plaintiffs in error. It is impossible to distinguish them, or to successfully controvert their doctrines, that the *undisclosed intentions and understandings of a witness or party to a transaction are never admissible as against the other party.*

We quote again from the Ohio Court in Crowell vs. Bank, 3 Ohio St. 411:

"It appears that the plaintiff below was not content with the statements of the defendants tending to maintain the action; but after the witness had related the conversation of the parties, he was further interrogated, and required to state his *understanding* or *inference* from the conversation as to the *understanding* or *meaning* of the parties. * * * * But to allow a witness, after having narrated a conversation of one of the parties, to be interrogated (and that, too, by the party calling him, notwithstanding the objection from the other side), and to state his conclusion or understanding from the conversation as to the meaning or understanding of the parties holding the conversation, would be a *most dangerous relaxation of the rules of evidence*, unwarranted by any reported decision which has fallen under our observation."*

And from Hewitt vs. Clark, 91 Ill. 608:

"The safe mode of proving an agreement by parol is to require the witness to state what was said, if anything, by either of the parties in the presence of the other on the subject. If a witness cannot give the words of the party, he may undoubtedly be permitted to state the substance of what was said. *He ought not, however, to be allowed to substitute his inferences from what was said* or *his understanding*. To permit a witness to answer such a question, 'it is my understanding, etc.,' is erroneous."

And from In Re Weisenburg, 131 Fed. 524:

"The question as to whom credit was given and from whom payment was expected could be determined only from the facts of the transaction, i. e., what was said and done before and at the time the notes were executed and discounted. It would not be affected by any testimony of Driscoll as to what *his notions in regard to the matter were*."

And from Gentry vs. Singleton, 128 Fed. 680:

"The inference or understanding to be drawn from what occurred at that time is to be determined by the Court or jury, and *the unexpressed thought or understanding of the witness was wholly immaterial*."

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*The *italics* in quotations in this brief are ours, except where otherwise specified.

It is clear, then, that the defendants must have been greatly prejudiced and injured by this constant and frequent repetition as to their *"understanding as to what the transaction was"* and as to *"what was their undisclosed intentions."*

As we have said before, the line between a lawful and unlawful transaction in relation to timber lands, as the law is construed by the highest authority, is an obscure and difficult one, and it must be remembered that it was contended by the defendant, Gesner, who was the moving party so far as the defendants were concerned in all this matter, that he had taken legal advice and did not in any manner overstep the law.

The defendants did not deny that Williamson and Gesner were desirous of getting control of these lands. They did not deny that one of their objects was the desire to protect their range.. They did not deny that they had let it be known in some instances, how much they could afford to and would be willing to pay for the land. They did not deny that they had loaned the money to different claimants with this in view; *but what they did claim* was that they had carefully abstained from *making or attempting to make any contract with the party in relation thereto,* and in this they were corroborated, not only by their own witnesses, but by a great number of the witnesses for the government, many of whom testified that Gesner told them that neither he or they could make any contract in advance.

Now the Supreme Court of the United States—the highest controlling authority—had construed this timber law, just in that way—*That a party had a right to loan money to aid timber claim-*

ants in making their claim with the expectation of buying the land, and that he had a right to go into a community and let it be known what he was filling to pay for the lands, for the purpose of inducing them to be taken, *and that the claimant had a right to take the land with the expectation of selling it a profit to such person*, and that the thing which the law prohibited, *was the previous making of a contract*, and that as long as there was no attempt to do that, either expressed or implied, the transaction was lawful and that the taking of the claimant for such purpose would not be a taking for speculation within the meaning of the law.

We quote from the opinion in the Budd case, 144 U. S., 154.

"The particular charge is, that Budd, before his application, had unlawfully and fraudulently made an agreement with his co-defendant, Montgomery, by which the title he was to acquire from the United States should inure to the benefit of such co-defendant. Upon this question the fact that stands out prominently is, that there is no direct tesimony that Budd made any agreement with Montgomery, or even that they ever met, or either knew of the existence of the other, until after Budd had fully paid for the land. No witness ever knew or heard of any agreement. What, then, is the evidence upon which the government relies? It appears that Montgomery purchased quite a number of tracts of timber lands in that vicinity, some ten thousand acres, as claimed by one of the witnesses; that the title to twenty-one of these tracts was obtained from the government within a year, by various parties, but with the same two witnesses to the application in each case; that the purchases by Montgomery were made shortly after the payment to the government, *and in two instances a day or so before such payment;* that these various deeds recite only a nominal consideration of one dollar; that Budd and Montgomery were residents of the same city, Portland, Oregon; that one of the two witnesses to these applications was examining the lands in that vicinity and reporting to Montgomery; and that the patentee, Budd, years after his con-

veyance to Montgomery, stated to a government agent who was making inquiry into the transaction that he still held the land and had not sold it, but that it was "in soak." But surely this amounts to little or nothing. *It simply shows that Montgomery wanted to purchase a large body of timber lands, and did purchase them.* This was perfectly legitimate, and implies or suggests no wrong. The Act does not in any respect limit the dominion which the purchaser has over the land after its purchase from the government, or restrict in the slightest his power of alienation. *All that it denounces is a prior agreement, the acting for another in the purchase.* If, when the title passes from the government no one save the purchaser has any claim upon it, *or any contract or agreement for it, the Act is satisfied. Montgomery might rightfully go or send into that vicinity and make known generally, or to individuals, a willingness to buy timber land at a price in excess of that which it would cost to obtain it from the government;* and any person knowing of that offer, might rightfully go to the land office and make application and purchase a timber tract from the government, and the facts above stated, point at naturally to such a state of affairs as to a violation of the law by definite agreement prior to any purchase from the government—point to it even more naturally, for no man is presumed to do wrong or to violate the law, and every man is presumer to know the law. And in this respect the case does not rest upon presumptions, for the testimony shows that Montgomery knew the statutory limitations concerning the acquisition of such lands, and the penalties attached to any previous arrangement with the patentee for their purchase."

So, also, in Olson vs. United States, 133 Federal 853, it was said by Munger, District Judge, expressing the opinion of the Court:

> "In the light of these decisions, as well as a sensible construction of the statute, we have no hesitancy in holding its true meaning to be that any citizen of the United States may purchase lands as therein provided, where such purchase is for his own exclusive use and benefit, *notwithstanding at the time of such purchase he may have in contemplation a future sale for a profit;* that what the statute denounces is that a party shall not, at the time of the purchase, have directly or indirectly made any agreement or contract in any way or

> manner with any person or persons by which the title he may acquire shall inure, in whole o rin part, to the benefit of any person except himself; that the application for the land must be made in good faith for his own exclusive use and benefit, and not as the agent or hireling of another to obtain the land for some one besides himself."

Here, then, it is obvious that the whole case of the government depended upon whether or not there was a contract, or, rather, upon whether or not the defendants *conspired to have a contract,* and *then have the applicants swear there was none.*

Assuming, then, the truth of the defendants' contention (corroborated as it was by nearly all the witnesses for the government), namely, that they desired to obtain this land if possible, that they were furnishing this money to the applicants with the expectation of buying it if they could, and that the applicants took the land, expecting to sell it to them, as they knew they wanted the land, and there were no other purchasers in the field at that particular time, but that defendant Gesner (who made all the arrangements) was carefully abstaining from making any contract, express or implied, being secured for the repayment of his money by the mortgages and notes of the applicant, and trusting to the improbability of there being other buyers, and the natural desire of the applicants to accommodate him on account of being a neighbor, and having furnished them the money with which to buy the land, and taking his chances on someone else coming in and bidding more than he could afford to pay, the transaction was, under this assumption, obviously entirely legitimate under the decision of the United States Supreme Court. There was no attempt to bind the parties to sell, either by an express or implied contract. They were at perfect liberty

to sell to someone else or to keep the land, and there was no sort of obligation upon the applicant's part to sell to him, unless it should be such slight obligation as would grow from a feeling of neighborly kindness and gratitude for an accommodation, which would probably incline them to give him the preference at equal prices.

As we have said, the transaction was perfectly legitimate. And yet the slightest misunderstanding of the effect of what was said or done on the part of these applicants might throw it over the line between the lawful and unlawful.

Many of these applicants (as is admitted in the supplemental brief of defendant in error, page 38) were ignorant people, and might easily suppose that Gesner's purpose to buy the land if he could, with his expression of the price he would be willing to pay, and his encouragement of them to file upon the land, together with their expectation to sell the land to him (all of which, as we have seen, was perfectly legitimate under the decision of the Supreme Court), amounted to a contract, or at least to an "understanding" in relation to the matter. And, of course, it might be in some sense an understanding, although not of that definite character amounting to an attempt to bind the parties, and therefore *not contractual in its nature.*

And yet these ignorant, uneducated persons, after having stated the facts—stated what was said and done, which in many instances corroborated the claim of Gesner—were permitted to tell the jury *what their understanding was of the transaction.*

Take, for instance, the case of the witness Calavan. He had already testified to everything that took place between him and Gesner, and after relating all this in detail, he was asked:

"Q. *What was your understanding at the time* as to what the terms were upon which you were taking it up?"

And he answered: "Why, I understood that I was to receive $500 for the same when patent issued."

"Q. And was it *your intention* at the time you were making that filing to convey it for the $500 as soon as you did get patent, or what was your intention in respect to it?"

"A. My intention was to convey it t othem when I got patent."

"Q. To whom?"

"A. To Gesner."

All of this was in the direct-examination, and all of which was objected to upon the ground that it called for a conclusion of the witness, and was incompetent and not binding upon the defendant in any way.

Printed record, pages 351 and 359.

It must be remembered that the witness had already testified what Dr. Gesner had said to him: "That he asked Dr. Gesner what Dr. Gesner would do, and Gesner told him the claims would be worth $500, or that he would give $500 for it when patent issued, but that he (Calavan) would be *under no obligation to sell to Gesner.*"

Printed record, pages 351 and 357.

So the witness Crain was asked:

"Q. What was *your understanding as to whether you had promised to do that or not?*" (To let Dr. Gesner have the land.)

To this the defendants objected, and the Court ruled that he might *state his belief.*

To which ruling the defendant excepted, and the witness was

then asked: "What do you believe?"

To which the defendants objected as irrelevant, incompetent and not binding upon the defendants in any way.

"A. Well, *I would have felt that way* if I had went ahead and proved up on the land, and they had furnished me the money to do it with." (This witness never proved up at all.)

"Q. *Was that your understanding of it?*"

"A. Yes, sir."

All of this went in subject to the objection and exception that the same was irrelevant, incompetent and not binding upon the defendants in any way.

Printed record, pages 388 and 395.

So the witness Hudson was asked:

"Q. What was your intention as to what you would do with the land at the time you signed that?"

"A. Well, I was going to sell it, of course, if I could. I took it up for speculation."

"Q. Sell it to whom?"

"A. *Well, I was going to sell it to the highest bidder.* I was calculating to make a thousand dollars out of it if I could, and if I couldn't I would let it go to Dr. Gesner."

"Q. *What did you understand* at that particular time as to *whether you had agreed to sell* it to Gesner or not?"

"A. Well, now, *I don't know; it was kind of an agreement*—a verbal one, though."

Printed record, pages 467 and 473.

And the witness Feuerhelm was asked:

"Q. What was your understanding when you left Gesner and when you filed on the claim *as to whether you had promised* that you would let him have it when you got the title?"

"A. Well, there was no real promising."

"Q. You ddn't say that?"

"A. No, sir."

"Q. But what was *your understanding* as to what *you be-*

heard and what *he believed?*"

"A. *I believed nothing else*, but I went in to file on the claim."

All this was admitted subject to the same objection as the other testimony.

Printed record, page 515.

Can there be any doubt that this incompetent testimony would influence the jury in arriving at a conclusion as to whether or not there really was a contract between the applicant and Gesner? and yet it is perfectly clear under the authorities we have already cited that it was incompetent for that purpose. Indeed the learned counsel for the defendant does not attempt to defend it upon that ground. But there is an attempt to *excuse* its admission upon the ground that it tended to show that these applicants *had actually committed perjury.*

It is expressly conceded, however, in the brief of the government (supplemental brief, pages 33 and 34) that actual perjury upon the part of the applicant was not a substantive or necessary element of the crime charged (*conspiracy to suborn*), and that it was neither *necessary to allege or prove that fact.*

But it is claimed that while the perjury of the applicants was in no sense a *necessary* or *material* element of the offense, yet it was "proper" to prove it for some collateral purpose.

But in what way could the undisclosed understandings and

intentions of these *applicants* throw any just or proper light upon the *previous plan* of the *defendants?*

It is true that the overt acts of the persons charged with a conspiracy, in the nature of a consummation of the plan, may be offered in evidence as throwing a back light upon their previous plan. This is only a corollary to the general proposition that the subsequent act of *any defendant* may be proven where it throws a light upon the question of whether or not he committed the crime charged.

But the secret intention and understanding of these applicants were in no sense an overt act. First, because they were not conspirators in *this offense;* and second, because their "understanding and intention" was not an "overt" act, or any act at all, but only *a state of their mind and understanding.*

That these applicants were not parties to the *conspiracy charged in this indictment* goes without saying. The conspiracy charged was to suborn *these same applicants* to commit perjury, and to say that an individual can be guilty of a conspiracy to suborn *himself* is an absurdity on its face, and the Court so charged the jury clearly in this case, that "such persons are not accomplices in the conspiracy or crime for which these defendants are being tried."

Printed record, page 1459.

If any perjury was committed by them they were, of course, accomplices, at least in *that* crime. Even if they could be said to be *conspirators* with one or more of the defendants, each to commit his own individual perjury, or even if each could be said to have conspired with one or more of the defendants to defraud the government in relation to his own particular piece of

land, that would not in any sense make them conspirators in the *general* plan charged against these defendants—that is, a general plan to suborn a large number of persons, *including these applicants* to *commit perjury*. And the rule admitting overt acts has never been extended to permit the overt acts of *other* persons *not parties to the conspiracy charged* in relation to *other conspiracies* not charged.

Again, an overt act, as its name implies, is an open, manifest act and does not rest in secret intention or corrupted understanding. It is the open act, generally, of the defendants themselves, but always *an open act*, of which the defendants may be assumed to have knowledge, and it is the direct antithesis of secret intention or understanding.

Black's Law Dictionary, Title, Overt Act.

Even if it be assumed that the open acts of these claimant were admissible as against the defendants, it could be only upon the theory that these acts were known to the defendants, and therefore threw back light upon the *previous plan of the defendants themselves*. But how could the undisclosed intention and probably warped understanding of these applicants, sequestered in their own mind and undisclosed to the defendants, throw any light upon the previous plan of the defendants? Are they to be charged and condemned because, forsooth, the applicants misunderstood their words or language? Or because of a possibly evil intent in the latter's mind?

Yet it was upon such pitiable pretenses as these that this testimony, so prejudicial to the defendants, so contrary to every principle of law and every principle of natural justice, is now claimed to have been admitted.

Authorities are cited in appellants' brief to the effect that direct testimony may be offered in *a proper case* as to the intention of a party.

We do not dispute this proposition, but these are all cases where the intention was a necessary and substantive element of the offense; and, therefore, where the intention of the third party was a *necessary element* of the prosecution's case, as where the defendant offers *evidence of his own intention* (such was the case of White vs. State in the 53 Indiana), or where the defendant is charged with the aiding or abetting of the *actual commission of a crime*, and it becomes *necessary*, therefore, to prove that the crime was actually committed by the third party, and therefore that he had the necessary criminal intent. Such was the case of Brown vs. United States, 142 Federal (where the party was charged with aiding and abetting in the misapplication of bank funds by a bank), and the case of Lamb vs. State, 95 N. W. 1050 (where the crime charged was the *actual procuring* of another person to steal the cattle). If the defendants had been charged in this indictment with the crime of actually suborning perjury, then a corrupt intent on the part of the alleged perjurers would have been a material element of the offense. Since they could not have been guilty of a subornation without the actual intention of the party suborned to swear falsely, and such testimony, as

will be seen by an examination of the authorities cited, is admitted, not for the purpose *of showing any evil intent, or plan, or purpose*, upon the part of the defendants, but to show that the crime, which they must be shown by *other evidence* to have instigated, was *actually consummated* by the other party, without which such instigation would not become criminal within the charge.

Here, as we have seen, it was entirely immaterial whether the crime was consummated or not, and the *acts* of the applicant could only be admitted (if at all) for the purpose, and only in so far as they threw a back light upon the alleged previous plan of the defendants. And this, as we have seen, the "understanding and intention" of the applicants could not do.

A number of authorities are cited to the effect that the courts permit a wide range in the matter of circumstantial evidence in the cases of conspiracy.

This is, no doubt, true, and it may occur to some minds at least that that is no reason why an offense of this nature should be provable by evidence which would not be considered sufficient or competent in other classes of crime just as heinous, and that the courts have gone quite far enough in permitting defendants to be tried for this crime upon mere suspicion, and remote and fanciful inference and conjecture.

But these authorities do not hold, and we do not know that it has been ever held, that even in circumstantial cases evidence can be offered which is *totally incompetent*, or that the party can

be tried or prejudiced—not by his own words or acts, not by any doings or circumstances within his knowledge, but by an understanding or misundertsanding, the intention or lack of intention, in another whose mind he cannot read and whose heart he cannot probe.

It is doubtful if this is a case of circumstantial evidence at all, except in the sense that all cases are circumstantial—that is depending and strengthened or rebutted to some extent by the circumstances surrounding the transaction. Surely, the evidence pro and con as to what was actually done by the parties as to the making of a contrate in this case, and what was actually done and said at the time, is as direct as it is in most cases, and the only element in this case which can be fairly said in any proper sense to depend upon circumstantial evidence is as to the previous combination and agreements of the defendants; and upon these, as we have already shown, the misunderstanding or bad intention of the *applicant* at a *subsequent* time could throw no light whatever.

And we submit again that there is no looseness of the law as to circumstantial evidence—no possible stretch of the discretion of the Court—which has ever been permitted to justify the admission of *positively incompetent testimony*, having no just bearing whatever upon the *charge in the indictment*, but tending to inflame the minds of the jury by showing that a large number of perjuries were, perhaps, committed in the transaction out of which the defendants' alleged guilt is claimed to have arisen, and to confuse and mislead the jurors by introducing the inferences and understandings (or, as we believe, misunderstandings) of

the witnesses, to control the facts and actual language of the defendants.

But it is now cunningly argued that this testimony was admissible as a sort of *cross-examination* of the government's own witnesses, upon the theory that they were unwilling. But this pretext is as idle as the other. The Court, it is true, had discretion t opermit *leading questions* to an apparently unwilling witness, and in that sense to cross-examine. But we have never seen it stated, and we think it has never been held, that this rule (or, rather, exception to the rule) justifies the introduction of *positively incompetent testimony*, or that under it a party can be permitted to prove his case by the *understanding or intention of his witnesses*, rather than by the facts themselves, or that it subjects the other party to the danger of being tried and convicted upon the misunderstandings and misinterpretations of a lot of ignorant people, utterly incapable of drawing close distinctions or legal discriminations. People so ignorant that, according to their own statements, when they were told they "*couldn't make a contract to sell the land*" without any qualifications whatever, yet claim that they "understood" that that meant "a *written contract.*" Or, like the witness Calavan, who was willing to swear that he "understood" that "he was under obligations" to sell to Gesner, although he said Gesner had told him in so many words that he was "to be under no obligations whatever."

It is true, as has been said, that the Court has discretion to permit a party to ask leading questions—put the words in the witnesses' mouths, and set aside the general rule impressed upon our judicial system by hundreds of years of experience: that the best way to get at the real truth is to let the witness *tell his own story in his own words.* We hope that this exception to the rule may some time be limited more closely than it is, for it seems to us there is no discretion more dangerous, and no place in the trial of cases where the trial Court is more likely to be imposed upon to the defeat of right and justice.

But the Court *has* that discretion, and the government exercised this privilege *to the utmost,* as appears by the record herein —not only leading its witnesses, but putting the words in their mouth, until it was, in many instances, no longer the *witness* testifying, but the *counsel,* and the witness only had to "O. K." what he said.

And it is because the Court *had this* discretion that we are not complaining here about the asking of these leading questions, and putting the words in the witnesses' mouths, and this is the reason we have not presented it as error in our brief in this case: not because we were conceding it was right—not because we believed that these witnesses were unwilling witnesses for the government.

Every circumstance in the case shows that they were not, but on the contrary, that they were held in the hollow of the government's hand.

True, according to the theory of the government, they were guilty of perjury; *but the fact that they were not indicted, al-*

though according to the government's theory they were guilty, shows that there was a perfect understanding between them and the government. They were swearing for their own salvation. They knew they had not been indicted, *because they had sworn* and *were to swear for the government* in these cases. *They knew that the government could still indict them.*

They knew that to be indicted—*whether guilty or innocent*—meant to these poor people financial (if not moral) ruin; that even if acquitted, the expense of a trial meant bankruptcy. Under these circumstances, as we have said, they were at the mercy of the government, and their only hope was in telling such a story as *would satisfy it.* They knew from the fact that they were not indicted, and that they were being used as witnesses, that however much they might commit themselves by their testimony, they would *never be indicted so long as they told a story against the defendants* which was *satisfactory to the government.*

Under these circumstances the learned attorneys for the government were permitted not only to lead them, but to put the very words into their mouths, not once, but systematically and constantly. To say, "Wasn't this so?" and "Wasn't that so?" and "Didn't you understand this?" and "Didn't you intend that?"

To our minds, the only unwillingness these witnesses showed was an unwillingness to perjure themselves in this case for the government—unwillingness to swear falsely that there was a contract made, or that they did promise to sell the land to Gesner, when they knew there was no such contract and that they had made no promise to sell.

It is a pretty hard test to put to any man, to ask him to swear falsely against his neighbor, *directly* and positively, *to a fact that does not exist,* even under the fear of the government and government prosecution. But when the government is permitted to ask them about an "understanding" it makes it *easier for their conscience,* and it was not such *bald perjury* to say that they *had an understanding,* or that they "*felt under obligations,*" or that they "*intended*" to convey the land.

"Understanding" is an indefinite and uncertain thing. It may mean much or it may mean little. It may be partial, nebulous, conditional and uncertain, or it may be definite, complete and exact.

The mere expectation of *probably* selling, if you know that the other party expects to buy, might amount to an "understanding" in some sense, although there was no attempt to *obligate each other* in any way.

As we have said, the Court had no *discretion* to permit the government to make its case by incompetent testimony, or by establishing the crucial fact as to whether or not the defendants *planned to have these applicants make a contract,* by *their* intention as to what they were going to do with the land and *their* understanding as to the *effect* of *the* arrangement between them and Gesner.

It is said in the supplemental brief of the defendant in error that these witnesses were unwilling to admit they had committed perjury, and that, therefore, the government should have been permitted to cross-examine them as to that. But for what purpose? These applicants *were not on trial,* and for the purpose of *this* case it would not, as we have already seen, make the least difference in the world whether these witnesses' general intent

and understanding would make their open act in proving up *perjury* or not. The only shadow of plausibility in the claim is that it would bear upon their credibility as witnesses. And under what rule is it that the government *may impeach its own witness* by showing *particular discrediting acts of that witness?* It is contrary to every elementary principle, and needs no authority to show it cannot be done.

It is also now urged on behalf of the government that these questions can be justified as to one or two of the witnesses who were thus interrogated, and who testified that Biggs told them that an arrangement would not be a contract unless it was in writing, and thereby, as is said in the supplemental brief, "took the advantage of their ignorance." But we submit that it is perfectly clear that this is a mere pretext, and the testimony was neither offered nor admitted on that ground.

If it had been, it should have been limited to the witnesses who had so testified, but it was not, and all the witnesses, even those who had had no talk with Biggs at all, were asked the same questions.

Besides (passing the improbability of Biggs, who was a lawyer, having told these witnesses that a contract would have to be in writing in order to be a contract), it is perfectly clear that such proof would be entirely inconsistent with the charge in the indictment. A plan upon the part of Biggs and the other defendants to deceive these applicants and induce them to swear that they had made no contract, by deceiving them and inducing them to believe that they had, in fact, made no contract, would be an entirely different thing from the charge in the indictment, because in that event the plan of the defendants would not be to have them commit perjury, which would be a *wilful and inten*

tional false swearing on the part of the applicant. And while the act might still be culpable, and might make the defendants guilty of planning to defraud the government, it would not be the offense charged in this indictment, which was not a "conspiracy to defraud the government," but a deliberate plan, the very purpose and intent of which, as stated therein, was to induce these applicants to swear *wilfully* false. All this makes it very clear, then, that the prosecution, after having charged one crime, the *"conspiracy* to suborn perjury," was trying to prove it by showing that the defendants had, perhaps, committed other crimes.

If the government desired to offer evidence of this kind, it should have charged the defendants with the far less serious crime of "conspiring to defraud the government," which would have been sustained by evidence, that the defendants were trying to deceive the applicant into swearing to an honest, but really false, statement. The trouble with the trial of this case was that it was presented to the jury upon a loose theory, and anything was admitted that tended to show that, at *some* time, a subornation of perjury or conspiracy to defraud the government had been committed, *whether it tended to sustain any element of the crime actually charged or not.*

We submit, therefore, again, in conclusion upon this matter, that the admission of this testimony was clearly erroneous, and must unquestionably have lead the jury to try the case, not upon what was said and done between the parties, but upon the vague understanding and supposition and imagination of these ignorant witnesses.

ERROR IN ADMITTING EVIDENCE TENDING TO SHOW THAT THE LAND INVOLVED IN THE ALLEGED CONSPIRACY WAS DEVOID OF TIMBER, IT BEING CHARGED IN THE INDICTMENT THAT THE CONSPIRACY RELATED TO LANDS SUBJECT TO ENTRY UNDER THE TIMBER AND STONE ACT.

The argument made by defendant in error in his supplemental brief upon this point entirely ignores the fact that the indictment itself charges conspiracy to suborn perjury when the several persons to be suborned would be applying to purchase and enter lands *subject to entry under the timber and stone act.*

The defendant in error calls the attention of the Court to the charge of the judge in this particular (pages 1463-1464 of the transcript of record), wherein it is said substantially that the relevancy of such evidence (the evidence tending to show that the land was more valuable for grazing than for timber) is the relationship it may have to the motive, intent or design of the defendants in the doing of the acts charged against them in the indictment under which they are tried; and defendant in error contends that this evidence is admissible for that purpose.

In effect, the jury were told that they could consider the evidence referred to in determining the motive, intent or design of the defendants in a conspiracy to suborn perjury when the applicants would be applying to enter land *more valuable for timber* than for other purposes.

How is it possible that a person's motive for suborning perjury, when applicants would be applying to enter land more valuable for timber than for grazing purposes, is shown in any way by evidence tending to show that the very land which it is claimed as a matter of fact was being applied for was void of timber?

It is not possible, in the first place, that the design of persons in suborning perjury to enter timber lands is shown by the fact that they had at other times sought to acquire grazing land improperly; but that is not this case.

A large part of this evidence related to and covered the very land that it was charged in the indictment the applicants would be applying to enter and purchase, and we submit that the prosecution cannot claim that such evidence is admissible for *any purpose.*

According to the indictment, the conspiracy was to suborn perjury when certain persons would be applying to enter and purchase, in the manner provided by law, certain lands of the United States lying in Crook County, in the District of Oregon, *open to entry and purchase under the acts of Congress approved June* 3rd, 1878, *and August* 4th, 1892, *and known as timber and stone lands.*

This is a part of the description of the offense, and it is too obvious, it seems to us, to require argument that the prosecution must prove the offense as laid, and should not have been allowed to offer evidence tending to show that the lands to which the conspiracy related were more valuable for grazing than for timber purposes, and consequently not subject to entry and purchase under the acts referred to, under the theory that this was done in order to show the motive, intent or design of the defendants in doing the acts attempted to be charged, the acts admitted to be charged being that the defendants conspired to have persons swear falsely when such persons should be applying to enter and purchase lands *subject to entry under the acts referred to.*

The theory of the defendant in error amounts to this: that the prosecution may offer evidence tending to show that defendants did not do the things charged in the indictment, in order to show their motives, intent or design in doing the things charged.

It is manifest, if the conspiracy involved subornation of perjury when persons would be applying to enter and purchase lands not subject to entry under the timber and stone act, that this was not the conspiracy charged in the indictment, and so the prosecution was allowed to secure a conviction by offering proof tending to establish a different offense from the one charged.

If a man was charged with the larceny of an animal, the particular charge being that he stole a white steer, the property of A. B., would any one for a moment contend that the prosecution might show that, in fact, the steer alleged to be stolen was black, and that such evidence was admissible to show the motive, design, etc., of the defendant in doing the act charged against him: namely, the act of stealing a white steer?

Or if the defendants were charged with conspiracy to commit a crime, the particular charge being that they conspired to steal one white steer, the property of A. B., would any one contend that in order to show the motive, intent or design of the defendants in doing the things charged that the prosecution might show that the particular steer to which the conspiracy related, and which the defendants conspired to steal, was black, and not white as charged in the indictment?

The two cases concerning the larceny of a steer are identical with the one at bar, in so far as the admissibility of evidence is

concerned tending to show motive, intent or design, and show the utter fallacy of the argument of defendant in error, as they are stripped of all matter immaterial to the question involved.

Counsel for defendant in error, in stating what the motive of the plaintiffs in error was, does not refer to the record showing where the testimony is upon which this claim is based. He is merely stating his inference from some evidence which was introduced in the case by the government, and does not refer to the contention of the defendants at all; and while we do not concur in his view, it is immaterial for the purposes of this case what the truth is, inasmuch as under the evidence admitted and the theory upon which the case was tried, by the judge presiding, the contention might be made.

On page 62 of the supplemental brief it is said:

> "The testimony of the various applicants shows conclusively that not one of them filed upon the land because it was valuable chiefly for its timber. On the contrary, the evidence clearly shows that very little, if any, of the land was chiefly valuable for its timber."

As shown by the references in our first brief, the government was permitted over the objection of plaintiffs in error to offer evidence tending to show that all of the land to which it was claimed that the conspiracy related was more valuable for grazing than for its timber.

The contention of the defendant in error now is that plaintiffs in error were extremely desirous of acquiring grazing land, and that they therefore had a motive to acquire such land in any possible manner. All this, however, does not tend to show the motive, intent or design for a conspiracy to procure people to take a wilful false oath when such persons would be applying

to purchase and enter land subject to entry under the timber and stone act, land which was more valuable for timber than for grazing purposes. Additional force is added to the contention that we are making by the fact that the conspiracy alleged in the indictment did not contemplate subornation of perjury as to the amount of timber on the land to be applied for. It was directly charged that the land was open to entry under the timber and stone act, and that the falsity of the oath to be taken consisted in the several applicants swearing that they had not made any contracts whereby the title which they might acquire should inure to the benefit of any other person.

Not a case is cited by defendant in error that bears even remotely upon the question here presented, and we confidently insist that non can be found in support of his claim.

All this evidence was ruled out at the first two trials, and admitted at the last trial under a claim that is utterly without foundation; that it somehow bore upon the motive and intent or design of plaintiffs in error.

As suggested before by us, when reduced to the last analysis the contention of defendant in error is simply this: it is permissible for the prosecution to show that the defendant did not do the thing charged against him in the indictment for the purpose of showing his motive, intent or design in doing it.

The argument for defendant in error proceeds upon the theory, apparently, that evidence that has a tendency to convict the defendants on trial of any offense is admissible, regardless of whether or not it has a tendency to show them guilty of the particular offense charged in the indictment.

The case of Olson vs. United States, 133 Fed. Rep. 849, is cited in support of the contention that it was admissible in the

case at bar to show that the land to which the conspiracy related was more valuable for grazing than for timber.

The Olson case holds, page 849, Section 6, syllabus:

> "Where circumstantial evidence is relied on to show that entries of land under the timber and stone act were fraudulent, and made for the benefit of others than the entrymen, to whom the timber on the lands was subsequently conveyed for a consideration shown, it is competent for either party to show the value of such timber, as a circumstance bearing upon the bona fides of the transaction."

If the entrymen in the Olson case received all the timber was worth, it was a circumstance tending to show the bona fides of the transaction, otherwise it tended in the opposite direction.

Such evidence is only admissible in case the evidence relied on is circumstantial.

In no event does the Olson case even remotely bear upon the question now under discussion, namely: may the prosecution introduce evidence contradicting an allegation of the indictment in a matter descriptive of the offense sought to be charged, for the purpose of showing motive, plan or design?

In the Olson case the evidence under discussion bore upon a question in issue.

In the case at bar the evidence admitted did not have the slightest tendency to support any matter in issue, and it resulted in securing a conviction founded upon evidence tending to show plaintiffs in error guilty of an offense not charged in the indictment.

The argument of defendant in error and all the cases cited upon this point are utterly without bearing upon this case, when it is borne in mind what the allegations of the indictment are.

Our first brief cites cases in support of the proposition that an offense must be proved as laid in the indictment; and we have repeated a portion of our first argument and restated the proposition in different forms here, because of the fact that our first argument failed to call the attention of the learned attorneys for the government to the point under discussion.

See the discussion in our first brief on this subject from page 98 to 105, inclusive.

We submit that the admission of the testimony complained of is plainly reversible error.

THE COURT ERRED IN CHARGING THE JURY AS FOLLOWS:

THE OFFENSE IS SUFFICIENTLY PROVED, IF THE JURY IS SATISFIED FROM THE EVIDENCE, BEYOND A REASONABLE DOUBT, THAT TWO OR MORE OF THE PARTIES CHARGED, IN ANY MANNER OR THROUGH ANY CONTRIVANCE POSITIVELY OR TACITLY, CAME TO A MUTUAL UNDERSTANDING TO ACCOMPLISH A COMMON AND UNLAWFUL DESIGN, FOLLOWED BY SOME ACT DONE BY *ANY ONE* OF THE PARTIES FOR THE PURPOSE OF CARRYING IT INTO EFFECT.

See transcript of the record, pages 1444 and 1465.

This error is discussed in our first brief, pages 139 to 141, both inclusive, and we refer to it again, although counsel for defendant in error does not mention it in his printed brief, because at the oral argument he contended that this error was cured by the following instruction:

See page 1458, transcript:

> "If, after weighing the entire evidence, you are satisfied beyond a reasonable doubt that affirmative answers to these several questions should be had, and you further find, beyond a reasonable doubt, that some one of the overt acts charged in the indictment was done by any one or more of the defendants for the purpose of effecting the object of the conspiracy charged, then you should convict such of the defendants as you may find entered into and formed such conspiracy."

It is apparent that the instruction last referred to does not state the law corectly itself, inasmuch as it directs the jury, in substance, that as far as the overt act is concerned it is sufficient if they find, beyond a reasonable doubt, that some one of the overt acts charged in the indictment was done by ANY ONE OR MORE OF THE DEFENDANTS for the purpose of effecting the object of the conspiracy charged.

The indictment charges that each one of the overt acts was committed by plaintiff in error, Biggs, and the jury must find, in order to convict, *an overt act by Biggs*, while this portion of the instruction authorizes a conviction if some one of the overt acts charged was done by *any one or more of the defendants*. The jury might convict under this instruction if an overt act was committed by Williamson or Van Gesner, or by both of them.

No jury could possibly get a correct idea of the law from this instruction and the one complained of. The instruction complained of is absolutely erroneous. The instruction which, as it is claimed, cures the erroneous instruction is itself erroneous and confusing. It is true, of course, that the instructions are to be read together, but when read together, if they fail to state the law correctly, they are erroneous. As far as this curative instruction is concerned, it is another case of the blind leading the blind.

TESTIMONY OFFERED AGAINST GESNER AND WILLIAMSON TENDING TO SHOW THAT GESNER HAD FRAUDULENTLY ACQUIRED SCHOOL LANDS FROM THE STATE OF OREGON.

Upon this question it will be necessary to say but little beyond what was said in our original brief (page 106 to page 132), since but a feeble attempt is made in the brief of the defendant in error to sustain the ruling of the Court upon this ground.

No attempt is made to attack or distinguish the great number of cases cited in our original brief, nor is there a single case cited to show that the Courts have ever gone so far in the admission of proof as to collateral offenses, as the Court went in this case. (See supplemental brief of defendant in error, pages 89 to 92.)

It must be remembered that these alleged collateral offenses were widely dissimilar from the one charged in the indictment. Indeed, there was no similarity except in the general character of the offenses.

The offense charged was "*conspiracy to suborn perjury*" in relation to *government* land to be taken under the *timber and stone* law of the United States. The conspiracy was alleged to be between Gesner, Williamson and Biggs, and the alleged plan was to have the applicants in question go before Biggs and swear falsely in relation to these *timber lands.*

The other crimes sought to be proven were subornations of perjury against another sovereignty—the State of Oregon—in relation to another and entirely different class of lands, to-wit,

school lands, and before another and different tribunal, and the acts of alleged subornation were those of only one defendant, and only two of the defendants were *claimed* to have been concerned in the alleged collateral crimes.

We submit again that the authorities cited by us in the original brief from Courts of the highest authority—some of which Courts are actually controlling upon this Court, and the others highly persuasive from the high standing of the judges announcing the opinions—are as near conclusive as anything can be, where a principle of law is involved. And that not a single case can be found where collateral crimes, so remote from the one charged and so essentially different and independent in their elements, have been admitted in evidence in a case of this kind.

Among the cases set forth on pages 118 and 119 of the original brief to which we wish to call especial attention again are the Sharp case, 107 N. Y. 427; the Boyd case, 142 U. S. 450; People vs. Molineux, 61 N. E. 286, and the Paulson case from Wisconsin, 94 N. W. 771, which are quoted from at length in the original brief; and we also desire to call the attention of the Court to the late case of Ferris vs. People, Illinois Supreme Court, 21 N. E. 821, and the opinion of Agnew, Judge, in Shaffner vs. Commonwealth, 72 Pa. St. 65.

We call especial attention to these cases, partly on account of the learning and high standing of the tribunals announcing the opinions, and partly because the opinions themselves are so clear, able and positive, and so conclusive in their reasoning that the exception to the rule permitting proof of collateral crimes in a few peculiar cases, and where the collateral acts are closely

similar in character, is not broad enough to justify the introduction of the evidence offered in this case; and, further, because they show so clearly how great the prejudice and wrong is to the defendant when the rule is overstepped, and they so stingingly rebuke the plausible pretexts under which such evidence is so frequently sought to be introduced.

It is said that this testimony was admissible for the purpose of establishing "knowledge, intent, motive and pre-existing design, system and scheme." (Supplemental brief of defendant in error, page 89.) But it is not pointed out in what way the collateral crimes tended to prove any of these things, or why these things became so peculiarly material in this case as to justify the setting aside of the ordinary rule and the introducing of a lot of testimony which must inevitably have greatly prejudiced the defendant in other ways—other crimes which, even if committed, ought not to have been permitted to have prejudiced the defendant in this case, and of which the defendants, if innocent, had no notice and no opportunity to fairly meet and disprove.

Let us analyze! The alleged commission of these other crimes certainly did not show the *motive* for the commission of the crime in question, because the lands were not the same; and the fact that a man had committed a crime to get one piece of land does not show a motive for committing a similar crime to get another piece, any more than the stealing of $10 from one man shows the motive for stealing $20 from another man at another time.

Possibly the mere fact that these defendants, or some of them,

owned school land which was in the same general locality as that filed upon might have tended in a remote way to show motive or probable desire on the part of the defendants to acquire the lands in question, if that desire had been in any way in question. But here there was never any question about the defendants' desire to control the range in that vicinity and to obtain the land filed upon by these applicants. Both the defendants, Williamson and Gesner, testified to this, and that they were loaning the money to these different applicants largely for that purpose. Surely, testimony so prejudicial to the defendants could not be put in under the pretext of proving something that was freely admitted, and stood without question in the case.

Then, again, even if the unquestioned fact that the defendants were buying and wanting lands in the vicinity was proximate enough to justify any inference of a motive to commit the crime in question, which was evidential in its character, yet it should have stopped with the mere fact of such ownership, and there was no necessity of going into the details and attempting to show that one of the defendants had *committed a crime and suborned perjury* in acquiring title to such land. Martin vs. Com., 93 Ky. 189, 19 S. W. 580.

Again, the alleged fact that Gesner had defrauded the state, or that he had suborned perjury in that regard, could not properly be said to show any scheme, or design, or system of planning together with Biggs to get other persons, in entirely independent transactions, to perjure themselves in relation to other independent lands, belonging to the United States government and taken under the timber and stone act—an entirely independent law.

The only way that the alleged defrauding of the State of Oregon and the alleged perjury in relation to school lands belonging to that state could throw any possible light upon any alleged design, system or scheme, in this case, would be on the general proposition that a bad man was more likely to commit a crime than a good man, and that a person who would suborn perjury in one transaction might be likely to have done the same thing in relation to other transactions having some similar elements, and this is exactly what all the authorities agree cannot be done.

So, upon the question of knowledge. In what way would these alleged collateral crimes tend to show knowledge on the part of these defendants? Indeed, knowledge cannot fairly be said to be an element of this offense.

If the defendants *did* the things charged—that is, if they planned together *to make a contract with these applicants for the sale of land, and then to induce these applicants to swear they had made no such contract*—how could there be any question about their knowledge? The acts charged necessarily implied knowledge. If the defendants did them, they knew they were doing them, and the acts charged were not equivocal in themselves. It was not like the act of passing counterfeit money, where the act itself is equivocal, and its lawfulness or unlawfulness depends entirely upon the knowledge of the defendant as to the character of the money. Here there is no such question involved, because the acts charged were not equivocal in their nature. The only question was: *did the defendants do the acts charged?* If they did, they must necessarily have had knowledge of the character of their action.

The same is true in relation to the matter of intent. There was no special intent involved, and no intent was in issue, except in so far as the intent is always in issue in every criminal case—that is, did the defendant intend to commit the act which he has actually committed? In this case, as in the matter of knowledge, this intent was necessarily involved in the doing of the act charged, if done at all, *because when a man plans to make a contract with another to buy a piece of land, and then induce that other to go before an officer and make oath that he has not made any such contract*, there is no room left for any question of intent upon his part.

Therefore, these other crimes could only show the intent in so far as they tended to prove the actual commission of the offense—*the doing of the act itself*—and it only bore upon this proposition by tending to show that a man who had committed one crime—had done one criminal act—would be likely to commit other offense—do another act—of the same general character, and this, as we have seen, is exactly what the authorities say cannot be done.

The language of O'Brien, Judge, in the Molineux case, is especially instructive here:

> "But that is only another way of asserting the general proposition that the commission by the defendant of one crime tended to prove that he committed another crime; and no matter in what form or how often that proposition is asserted, or how persuasive or plausible it may appear, it is erroneous and misleading."

And again:

> "*We may attempt to deceive ourselves with words and*

phrases by arguing that it is admissible to prove intent, or identity, or the absence of mistake, or something else, in order to bring the case within some exception to the general rule; but what is in the mind all the time is the thought, so difficult to suppress, that the vicious and criminal agency that caused the death of Barnet also caused the death of Mrs. Adams."

So, in the language of Mr. Justice Peckham in the Sharp case:

"It is a very general and extremely broad and, I think, a dangerous ground upon which to claim the admissibility of evidence of this character, to say that it tends to show that the prisoner was desirous of obtaining a railroad on Broadway that he was willing to commit a crime for the purpose of securing his object. It seems to me this is nothing more than an attempt to show that the prisoner was capable of comimtting the crime alleged in the indictment because he had been willing to commit a similar crime long before, at another place, and for the purpose of accomplishing the commission of another act by a different person. * * * *It throws light upon that intent only, as it tends to show a moral capacity to comimt a crime.* It gives, under the circumstances, *entirely too wide an opportunity for the conviction of an accused person by prejudice*, instead of by evidence showing the actual commission of the crime for which the defendant is on trial."

The peculiar and special cases in which evidence in relation to other crimes have been admitted were generally cases—

1. Where some *specific intent* other than the mere intent to do the act charged was charged and directly involved, as in the cases of *assault with intent to kill*, or to rob, or to ravish, or *an intent to defraud*, etc.

2. Cases where the criminality of the defendant depended peculiarly upon his *knowledge* as to some essential element, and where the act itself is equivocal, and collateral acts of a closely similar nature have been admitted o nthe ground of necessity, there being no other way of proving knowledge of the essential fact. Such are cases of passing counterfeit money, etc.

3. Where the collateral act in question is so intimately involved with the crime charged as to make it impossible to fully present the one without disclosing the other. Such are cases where other articles of property belonging to different owners are stolen at the same time as the article charged—cases where othr stolen articles are found in the possession of the defendant together with the article in question, etc.

4. Cases where the collateral crime may be fairly said to furnish a motive for the commission of the crime charged. As where a person is indicted for stealing a horse, and at the time the horse was taken he is claimed to have taken it to aid him in fleeing from justice on account of some other crime; or where the defendant is charged with the crime of murder, and it appears that the deceased had knowledge of some other crime, previously committed by the defendant, or was engaged in investigating such previous offense, and therefore the defendant had a direct motive for getting him out of the way.

We think that all the well considered cases, in which the general rule has been set aside and testimony of other crimes have been admitted, may be traced distinctly to one of these classes.

There may be sporadic cases which can be cited which have confused these distinctions, but, if so, we submit that they will be found to be poorly considered and not at all persuasive.

It is sometimes said that such evidence is admissible when "intent" is involved, but these cases must be construed as referring to some *special* intent, and not to the mere intent to do the criminal act charged, since a general intent is involved in and essential to every crime, and the application of the exception to such an intent would entirely destroy the rule against the admissibility of collateral crimes and make them admissible *in every criminal case*, and would be entirely in conflict with the long line of cases cited in our original brief on pages 118-119, among which are the cases of People vs. Molineux, People vs. Sharp, Commonwealth vs. Jackson, and Schaffer vs. Commonwealth, already commented on at so much length; and the controlling case of Boyd vs. United States, 142 U. S. 450—controlling because in that case *the general intent was directly involved* it being claimed by the government that the crime was committed in *attempting to rob*. Yet the government was not permitted to show other robberies committed by the same defendants only a short time before, Mr. Justice Harlan saying "*proof of them only tended to prejudice the defendants with the jury, to draw their minds away from the real issue.*"

We think that the cases cited in the learned brief of the attorneys for the defendant in error upon a similar question, and bearing somewhat upon this, are all belonging to some one of the classes that we have indicated, and are clearly distinguished from the case here.

The case of Ward vs. United States, 16 Peters 342, clearly belongs to both the first and second classes.

The case arose out of alleged fraudulent invoices and *a design to avoid the payment of duties*, and thereby defraud. A design to avoid the payment of duties was specifically alleged and was an essential element. The other fraudulent invoices admitted were closely similar. They were for the same class of goods, shipped by the same party, to the same party, and under exactly the same circumstances, and were admissible both for the purpose of showing the alleged specific fraudulent intent, and also for showing knowledge that the goods were undervalued.

Moore vs. United States, 150 U. S. 57, belonged just as clearly to the fourth exception. It was a case where the deceased was supposed to be investigating a previous crime, which, if committed by the defendant (as claimed), furnished a direct and obvious motive for the defendant to get hi mout of the way.

The Olson case in the 133 Federal, and other cases of the same kind, belonged to the first class. There the very gist of the offense was the *intent to defraud*, and the testimony in relation to the other offense exactly similar in every particular—violations of the same law, by the same parties, in relation to the same class of land.

This case, and all cases where a specific design *to defraud* is the gist of the charge, are a long journey from a case like the one at bar, where a conspiracy is charged to do an act which is unlawful in its very nature, and which, if done at all, neces-

sarily involves, from the very character of the act, the general criminal intent.

It is said in relation to this class of testimony, and also in relation to the evidence as to lands not being timber land (although it was described as timber land in the indictment), that it was admissible *in rebuttal*, because it tended to show "knowledge and intent," and because it is claimed to have falsified the claims of the defendant. But knowledge and intent (if material at all) are always an element of the prosecution's case *in direct*, and this testimony did not show any falsity in the claim of the defendants unless it may be said to show that they committed other crimes, and therefore were more likely to have committed the crimes charged, and this, as we have seen, was clearly inadmissible.

If the defendants had denied that they were interested in land in that locality, or had denied that they desired the use of this land for their sheep, or that they wanted other land in that vicinity, it would have been a different thing; but there was no such claim whatever. And, therefore, the only effect of this testimony was to lead the jury to believe (rightfully or wrongfully) that they had been engaged in other crimes of the same general character, and therefore were more likely to have committed this offense.

However, we are not depending greatly upon the matter of the proof being offered in rebuttal, since the order of proof may

be claimed to be within the discretion of the Court, and we do not have to assume the task of showing that there was an abuse of discretion.

What we do claim in that regard is that it *aggravates the error in admitting the evidence at all,* since it gave the defendant less notice and opportunity to meet and disprove the collateral charges than he would have had if presented in the government's direct case.

It must be remembered that the case was being tried hundreds of miles from the locality in question, and that such locality was a remote interior point, not reached by railroad lines of travel, and these matters of the alleged collateral offenses, of which the indictment had given the defendants no notice whatever, were held back and presented at the last minute, within a few hours of the close of the case, and when they were entirely defenseless against the deadly venom of the collateral charges.

In this regard we quote from the Circuit Court of Appeals for the Eighth Circuit, in the case of Golden Reward Mining Co. vs. Buxton Min. Co., 97 Fed. 417, which was a civil case, but the reasoning of which is applicable here:

> "And that the attention of the jur ywould have been unduly distracted had the trial Court admitted evidence which would have permitted such issues to be raised with respect to the ore mined on the defendant's claims during the period of the trespass. Besides, it would have been not only *unfair, but extremely prejudicial to the plaintiff*, if, after the defendant had opened its case and made considerable progress therein, a class of testimony had been admitted which would have compelled the plaintiff, for its own protection, to make

a careful examination of the slopes, levels and drifts within the defendant's territory, even if such an examination was then possible, for the purpose of showing in rebuttal what was the amount and value of the ore which the defendant had obtained within its own claims."

If this is true in a civil case, and as to matters which the parties had some notice by the pleading, how much more is it true in a criminal case where the liberty and reputation of presumably honest and honorable men are involved, and where the evidence is as to alleged collateral offenses, of which they had no notice, and of which they can only be supposed to have had knowledge, by assuming *in advance* that they were *guilty* rather than innocent of the collateral wrongs?

We submit, therefore, that the contention about these collateral offenses being admissible for the purpose of showing design (?) or knowledge (?) or intent (?) or scheme (?) or system (?) in a case of this kind, where these things are only involved, as they are in all criminal cases, is a mere pretext—a mere drapery of idle words, which is to be thrown over the great wrong and prejudice which was done to these defendants in order to hide its viciousness from view.

The detail and particularity with which the criminal elements of these alleged acts upon the part of the defendants was presented and dwelt upon could not have been for any other purpose than the obvious one of prejudicing the defendants by holding them up before the jury as men of criminal depravity who had been at other times engaged in criminal acts of the same general character, and therefore who were likely to have committed the crime in question, without giving the defendants any chance or notice of what was to be done, or any fair or

adequate opportunity to meet, or to excuse, or to palliate the charge of these other crimes.

Let the language of Mr. Justice Peckham, in the Sharp case, speak again as to the admission of this kind of evidence in a case like this:

> *"It is a very general and extremely broad, and, I think, a dangerous, ground upon which to claim the admissibility of evidence of this character to say that it tends to show that the prisoner was desirous of obtaining a railroad on Broadway that he was willing to commit a crime for the purpose of securing his object. It seems to me this is nothing more than an attempt to show that the prisoner was capable of committing the crime alleged in the indictment because he had been willing to commit a similar crime long before, at another place, and for the purpose of accomplishing the commission of another act by a different person. To adopt so broad a ground for the purpose of letting in evidence of the commission of another crime is, I think, of a very dangerous tendency. It tends necessarily and directly to load the prisoner down with separate and distinct charges of past crime, which it cannot be supposed he is or will be in proper condition to meet or explain, and which necessarily tends to very gravely prejudice him in the minds of the jury upon the question of his guilt or innocence.* I do not think that evidence of the kind in question, and in such a case as is here presented, legitimately tends to enlighten a jury upon the subject of the intent with which money was paid many months thereafter to another person, at a different place, and to accomplish the commission of another act. *It throws light upon that intent only, as it tends to show a moral capacity to commit a crime. It gives, under the circumstances, entirely too wide an opportunity for the conviction of an accused person by prejudice, instead of by evidence showing the actual commission of the crime for which the defendant is on trial."*

IMPEACHMENT OF WITNESS BRANTON.

It is admitted in the brief of the learned attorneys for the government that this witness was a very important witness for the defendant.

It is true that the learned attorneys see fit to make a fling at the credibility of the witness and say that his tesimony bore the "earmarks of perjury."

But we submit that the statement is entirely gratuitous and has no bearing whatever upon the legal question involved, and is entirely without foundation in fact.

The air and manner of the witness was as frank and candid as that of any witness in the case, and there was absolutely no notive for him to commit perjury. He did not know any of the defendants at all, except the slight conversation he had with Gesner at the time of the transaction in hand. There was absolutely no question about his being with the other men at the time of their talk with Gesner. All the witnesses for the prosecution, without exception, corroborated him as to his being there. He did not *make any filing whatever*, and, therefore, was entirely free from any criminality in the matter himself. At the time of the trial he had been living on a homestead at Sisters, some twenty or thirty miles away from the lands in question, but in the same county for two or three years.

At the first trial of the case nobody seems to have known his whereabouts, although his presence at the talk with Gesner was freely mentioned by the other witnesses. During the second trial of the cause he happened to be at Prineville at the office of an attorney there and read the account of a portion of the trial in which the witnesses had narrated what they claimed to be the transaction. He mentioned the fact that he was present and gave his understanding of the story, and the result was that in the third trial he was subpœnæd.

There is nothing in the world in his story to justify the reckless charge of perjury made in the brief of the learned attorneys for the defendant in error.

In the intelligent and the frank telling of his story there is a pleasing contrast with the shuffling, evasive and contradictory stories of nearly all the witnesses for the government, and one cannot read his story and then turn to the reflections in the brief which we are answering without a feeling that the enmity displayed grows from the fact that this witness was in a position where he could not be successfully bullied by government detestives into swearing to something which was not true, as he was absolutely free from wrong in the matter, and therefore no one could hold any club over his head.

On his direct-examination he was asked to tell, and did tell, the simple story of what took place at the time of the talk with Gesner, as he understood it. He did not refer in any way to the occasion about which he was afterwards cross-examined (which was two or three days before the main transaction).

In order for the Court to see just what foundation there was

for his cross-examination and subsequent impeachment in relation to the collateral matter, we print his direct-examination in full:

"Q. Where do you reside?"

"A. At Sisters, Crook County, Oregon."

"Q. Do you remember going up into the timber with Campbell Duncan and perhaps some others in June, 1902?"

"A. Yes, sir."

"Q. On that trip you state to the jury whether or not you saw Dr. Gesner, one of the defendants."

"A. Yes, sir, I did; at a claim they call the Williamson shearing plant, on that trip."

"Q. Did you hear any talk between Dr. Gesner and the people there relative to the timber claims?"

"A. I did."

"Q. You may state who was present, as far as you now recall, when he made that talk."

"A. There was five, I think, or possibly six, men present; to be positive to the number I would not; I would not swear to that. There was Campbell Duncan and a man by the name of Ray; I don't know his name except Ray, and I think two other men. I would not be positive as to two, but one other in particular, who said his name was Beard. He was a man I would not know if I met him again; I have entirely forgot his looks, but that was the number. There might possibly have been six, but at any rate five. Do you want me to state the conversation?"

"Q. Yes; you may state the conversation as far as you remember it occurring between them referring to timber claims."

"A. Well, as regards to the exact matter that was brought up, I would not be positive to the words used, but at any rate this man who claims—the man I think they call—Dr. Gesner called him Beard, if I remember right—"

"Q. You think what?"

"A. I think the doctor called him Beard; this man asked Dr. Gesner what about these claims; will you buy them, these timber claims. Dr. Gesner stated to him that he could not buy them, he could not make a contract at all, and, further he said, 'You can't sell them,' and went ahead to give his reasons for it."

"Q. What reason did he give?"

"A. He said that he had legal advice on the matter, and that he was told that he could not make any contract at all."

"Q. Was there anything said as to what these timber claims would be worth?"

"A. Why, the doctor did say, finally, that after they got their patents, if they wanted to sell them, they would be worth at least $500 to him."

"Q. Did you hear him say anything about a mortgage?"

"A. Why, yes, sir."

"Q. What was said about the mortgage?"

"A. About the mortgage?"

"Q. Yes, if anything."

"A. Why, the doctor said he would loan them the money to prove up on the timber claims, and would take their notes, and take a mortgage to secure him."

"Q. Was anything said as to how long the mortgage was to run?"

"A. There was to be no definite period, was my understanding; that it did not make any difference to the doctor how long they ran, was my understanding of the matter."

"Q. Was anything said about the rate of interest and how the interest was to be paid?"

"A. He said he would charge no interest, provided he got the use of the grass."

"Q. Did he state for what purpose? What was his language relative to the use of the land?"

"A. Well, I don't exactly understand your question, Mr. Wilson."

"Q. Was there anything said so that you knew how the interest was to be paid?"

"A. Yes, he said that he wanted to use it for grazing purposes."

"Q. For grazing purposes?"

"A. Yes, sir."

"Q. The use to pay for the interest? For the grazing purposes?"

"A. That was my understanding of it."

"Q. Was there anything said in your hearing to the effect that the doctor was to furnish the money to prove up on, and after getting the title to pay the balance?"

"A. No, sir, I don't remember anything."

"Q. Did you hear him ask anybody if they were satisfied with such a proposition, and did they assent or dissent?"
"A. I did not."

Printed record, pages 1102-1105.

This was his entire direct-examination.

Upon cross-examination the witness testified upon this question in answer to questions propounded by the defendant, as follows:

"Q. How did you happen to be up in that country at the time these timber claims were being taken up? Where were you going then?"
"A. I was going to Eastern Oregon from Lane County. I had been in the lumber business on the Siuslaw, and got washed out and pretty badly used up, lost something like $4,000 worth of logs in the flood, and was feeling rather on the blue order, and didn't feel like logging at the present time, and I went out there with the idea of taking up a homestead, and possibly locating in the country."
"Q. I thought you were on your way to Idaho; wasn't you?"
"A. When I met Campbell Duncan?"
"Q. Yes."
"A. No, sir, I was not."
"Q. Did you say you were?"
"A. I did not."
"Q. You didn't tell him that?"
"A. I did not."
"Q. Did you tell anybody that?"
"A. I did not."
"Q. How did you come to go to Campbell Duncan's house?"
"A. *I was on my way to Vale, Oregon, in the eastern part of the state. I had a younger brother there by the name of Fred, and he wanted me to come out to where he had located, and I had started at that time, thought I would go*

up there, and I came along where Campbell Duncan was living."

Printed record, pages 1118-1119.

This was the only foundation for the impeachment.

The witness Adams was then called for the purpose of impeaching the witness Branton, and after some preliminary questions was asked the following question:

"Q. Well, did he state to you that he was going to Idaho at that time?"

The defendant's objection that this was not proper impeachment and incompetent was overruled, and the witness answered: "Yes, sir." And again:

"Q. I am talking about the time he camped there; did he state to you that he was going to Idaho?"

Same objection, and the witness answered: "Yes, sir."

Printed record, page 1248.

Then the witness Duncan was called and practically the same questions were asked of him.

Here, then, the witness was distinctly *held up before the jury as being impeached* and discredited in relation to this immaterial matter—a matter that had no bearing whatever upon the issues of the case, and about which either he or the witness for the prosecution might be readily mistaken.

The statement that he made on the witness stand, and which was sought to be impeached by this testimony, was his answer upon cross-examination, that at the time *he had started to go to Vale, in the extreme part of Eastern Oregon*, where he had a brother.

The Court will take judicial notice that the town of Vale is more than 200 miles from Prineville, in the vicinity of which place this talk occurred. It could not make the least difference in the world, with the merits of this case, whether he was on his way to *Vale in the eastern part of Oregon*, as he said on the trial, or whether he was *going across the line into Idaho*, as it is claimed he said to Duncan and Adams.

The rule is universal that it is error to permit the impeachment of a witness in relation to such collateral and immaterial matters, and yet this was deliberately done by the learned attorneys for the government, and the witness was held up before the jury as discredited by a supposed contradiction in relation to such a matter; and the ruling of the Court could not be construed in any other way than as indicating to the jury that it was proper matter for them to consider in that regard.

Of course, the review of Branton's testimony in the brief of the learned attorneys for the defendants in error is a mere matter of argument as to his credibility, etc., and cannot have any weight here. Whoever may be right as to the credit and truthfulness of this witness, nobody will dispute that we had a right to have his testimony submitted to the jury and weighed

by them, free from any discrediting methods that could not be applied to any other witness.

It is said that "no harm could have been done in permitting Campbell Duncan to testify in answer to the impeaching question," because it is said he had already testified to that fact under cross-examination *before the witness Branton had been called at all.*" It does appear that there had inadvertently crept into the case a statement of Duncan of a similar character, but we submit that this is not an excuse or justification for the deliberate impeachment of the witness Branton in that regard. The statement by Duncan in his cross-examination was not directly responsive to the question asked, nor was it a matter of any importance at that time, as Branton had not been on the witness stand, and it was not apparent that it was, or would be, in any way in conflict with his story. The statement seems to have escaped the attention of counsel on both sides at the time, and probably made no impression upon the jury. The jury had absolutely no right to consider it for the *purpose of impeachment*, since no foundation whatever had been laid for it, and the defendants were entitled to have the Court so instruct the jury.

But when an apparent foundation was laid for his impeachment by the cross-examination of Branton putting the words into his mouth, and then when Duncan was deliberately recalled on rebuttal *for the very purpose of impeaching the witness*, and the objection of the defendant was overruled, *how could the jury understand anything else but that it was a proper matter for them to consider as an impeachment* of the witness?

Then, again, it is perfectly obvious that the further impeachment of this witness by Adams, *who had never testified at all in relation to the matter*, would be in all respects damaging in its character. Every witness was a new accumulation against the defendant. As between Branton and Campbell, the jury might believe Branton, or they might not know whom to believe; but when to that was added the impeachment by Adams, they would or might probably think that the witness Branton was effectively impeached and discredited.

It is too well settled to admit of controversy that the calling of one witness on impeachment, who was incompetent, or as to whom there is on foundation laid, will not be any the less error because *some other witness has properly testified to sustain the same impeaching fact.* For who can say that the witness as to whom no proper foundation was laid was not the very one the jury believed? and the same is true in a case of this kind.

But it is said that it was material because, as is said:

> "If Branton had expected to remain there, he would be much more able to remember accurately what Gesner had said."

We submit that there is no such rule of logic, but if there was, and so remote and conjectural a bearing could make a proper founadtion for impeachment, the argument is entirely dissipated by the fact that Branton had not testified at any time that he expecte dto remain in that vicinity. On he contrary, the statement sought to be impeached was *that he was on his way to Vale*, which, as we have seen, was more than 200 miles away, and it was sought to impeach this by showing that he said at the time that, *instead of going to Vale, he was going to Idaho.*

What difference could it possibly make in his memory whether he was going to Vale on the Oregon side of the line, or to Idaho across the line, and forty or fifty miles farther on? It needs no reasoning to show the utter futility of these arguments or to make it clear that this witness was held up before the jury as being impeached, upon a collateral matter which, in so far as the issues of this case was concerned, was wholly and entirely immaterial.

But is also said that it was proper cross-examination for the purpose of testing the memory of the witness. Assume that this was true *for the purpose of cross-examination*, and it does not follow that you could *impeach the witness* in relation thereto. There are many collateral matters about which a witness may be asked in cross-examination for the purpose of testing his memory; but the rule is as old as the hills that his answers in relation to suc himmaterial and collateral matters is conclusive. Yoou cannot, then, follow it further and impeach him by attempting to show that he was mistaken, or wilfully and deliberately lied in relation to such matters.

Rapalje on Witnesses, page 348, Section 209, Subdivision 3.

Thousands of authorities might be cited to the same effect, but the principle is elementary, and we do not deem it necessary in this honorable Court.

So, it is so plain that the defendant is *prejudiced* by having his witnesses held up for impeachment upon such matters that we have not thought it necessary to cite any great number of authorities theroen.

If a learned judge, sitting on the bench, would think, even on the spur of the moment, that it was proper to be considered for such a purpose, how could it be hoped that the untrained minds of jurors would not be prejudiced thereby?

The authorities, however, cited in the main brief are conclusive that the admission of such evidence is reversible error; and, indeed, theer is no case where it was held otherwise.

Th case of People vs. McKeller, 53 Cal. 65, is directly in point on this question. Also the case of Pierce vs. Schaden, 50 Cal. 540, in which one of the honorable judges of this Court participated.

We submit, therefore, that it is perfectly clear that, upon this point alone, the defendant is entitled to a reversal in this cause.

There are several other questions which were presented in our original brief, but as the learned attorneys for the government have not attempted to make any answer to them we do not deem it necessary to add anything further thereon.

In conclusion, as in our original brief, we again invoke the judgment of this Court that the Court below erred in at least eight important particulars:

1st. In holding that the indictment was sufficient.

2nd. In holding that evidence of the alleged perjury in the

matter of final proof was admissible, and sustained the charge in the indictment.

3rd. In permitting the witnesses to state *their understanding* of the transaction with Gesner, and their undisclosed intentions as to the final disposition of their claims.

4th. In charging the jury that the indictment might be sustained by proof of an overt act by *any* of the defendants, whereas the indictment only charges overt acts of the defendant *Biggs*.

5th. In refusing to instruct the jury that there must be, in some form, a *definite agreement* or concert of action between the parties to make a conspiracy, and that a simple intent *to evade the provisions of the timber law* would not sustain the indictment.

6th. In admitting evidence of alleged distinct offenses *against the State of Oregon* in the matter of its school lands.

7th. In admitting evidence that the lands were not "most valuable for their timber," and were *not subject to entry under the timber law*, and as to alleged perjuries in that regard under an indictment which did not charge such perjuries, but did charge that the lands *were* subject to entry under that act.

8th. In permitting the witness Branton *to be impeached as to collateral and immaterial matters.*

We assume, of course, that however great the supposed interest of the government may be in this case, that we will receive at th hands of this Court every careful protection to our rights and every presumption of innocence, that the law accords to the

commonest malefactor charged with the commoner and grosser crimes—we ask for nothing more—we are surely entitled to expect that.

Respectfully submitted,

ALFRED S. BENNETT,
H. S. WILSON,
Attorneys for Plaintiffs in Error.

No. 1369

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IN THE

United States Circuit Court of Appeals

For the Ninth Circuit.

VAN GESNER,
Plaintiff in Error,
vs.
UNITED STATES OF AMERICA,
Defendant in Error.

MARION R. BIGGS,
Plaintiff in Error,
vs.
UNITED STATES OF AMERICA,
Defendant in Error.

JOHN NEWTON WILLIAMSON,
Plaintiff in Error,
vs.
UNITED STATES OF AMERICA,
Defendant in Error.

SUPPLEMENTAL BRIEF OF DEFENDANTS IN ERROR.

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Filed this.....day of January, A. D. 1907.
FRANK D. MONCKTON, Clerk.
By.....Deputy Clerk.

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SUPPLEMENTAL BRIEF OF DEFENDANTS IN ERROR.

ADMISSION OF EVIDENCE.

The plaintiffs in error contend that the trial Court committed errors in the admission of evidence,

but in discussing these errors in their brief they have failed to point out the pages of the record upon which these alleged errors can be found, and we think that this is sufficient reason for the Court to decline to pay any attention to them. It is certainly not the duty of the Court to search through voluminous records to discover whether or not the errors assigned by the plaintiffs in error actually exist.

As a matter of fact, however, the plaintiffs in error did not in a single one of the alleged errors of admission of evidence assigned in their brief, make a sufficient objection to the admission of the evidence, or save an exception to the ruling of the Court thereon.

It was our original intention to ignore these assignments of error, for the reason stated, but we have concluded that it is perhaps our duty to aid the Court by pointing out specifically the place in the record where these respective alleged errors can be found, and by calling its attention to the absence of the proper objections and exceptions as shown thereby.

As the plaintiffs in error enumerate and specify one hundred and thirty-nine alleged errors as being relied upon by them, we will not undertake to point out where all of them can be found in the record, but will confine ourselves to those which the attorneys for plaintiffs in error have considered of sufficient importance to present argument upon.

Their argument of these assignments of alleged error as to admission of evidence, commences on page 86 of their brief.

POINT I.

The evidence in relation to the first assignment of alleged error is found in Volume II of the Transcript of the Record, at page 545. The attorneys for plaintiffs in error purport to quote from the record. The questions and answers of the witness Christian Feuerhelm are found at that place. After correctly quoting the questions and answers, the attorneys for plaintiffs in error inject into their brief, between the last question and answer, the following matter which is not contained in the record, to wit: "to " which the defendants objected as incompetent and " immaterial, calling for a conclusion of the wit- " ness and not binding upon the defendants, but the " objection was overruled and the defendants ex- " cepted, and the witness answered." An examination of the record at page 545 discloses the fact that no objection whatever was made, and necessarily no ruling was made and no exception whatever was or could have been saved.

It is only fair to call the attention of the Court to the fact that in Volume II of the Transcript of Record, at pages 515 and 516, the attorneys for plaintiffs in error, have inserted in the bill of exceptions a statement which does contain an alleged objection and exception such as they set forth in

their brief. Immediately following it, however, is this statement, to wit: "The following is all of the "testimony of the aforesaid witness, Christian "Feuerhelm, introduced at the trial: September "13, 1905. CHRISTIAN FEUERHELM, witness called "on behalf of the Government, being duly sworn, "testified as follows:

Then follows the complete record of the proceedings which were actually had in the Court, and at page 545 the questions and answers appear upon which the plaintiffs in error predicate their assignment of error. It is apparent that the aforesaid statement at pages 515 and 516 crept into the record without being noticed by the attorneys for defendants in error, or by the trial judge. It would be unfair to the trial Court and would certainly not be in the interest of justice to permit objections and exceptions that were never taken at and during the trial, to be inserted in the record at the time of the settlement of the bill of exceptions, as to the admission or rejection of evidence. The purpose of requiring an objection to be made, and an exception to be saved, is to enable the trial Court to then and there correct the error, if any has been committed, by having its attention specifically directed to the same, to the end that long and expensive trials shall not be had to no purpose.

In this particular instance, the answer of the witness was in no way prejudicial to the plaintiffs in error, because the witness in effect stated that he

believed nothing except what he had already testified to as having occurred. This was not in any way an expression of his opinion, conclusion or understanding of the meaning of anything said or any act done by any other person.

The objection and exception even if it was permitted to be inserted in the Bill of Exceptions with the knowledge of the Court, were made too late. See

> *Thiede v. Utah Territory,* 156 U. S. 510, and *Mich. Ins. Bk. v. Eldred,* 143 U. S. 293.

POINT II.

The next witness is Joel E. Calavan, and the testimony about which plaintiffs in error complain, commences at the bottom of page 356, Volume 1 of the Transcript of the Record.

The record is correctly quoted in the brief of plaintiffs in error, at page 87 thereof, down to and including the question, "Q. Was anything said " about why he wanted the claim filed on? A. Why, " I think he told me that he wanted to protect his " range from other stock men." This question and answer appear at the bottom of page 357 of the record. Plaintiffs in error say at bottom of page 87 of their brief, "he was then asked this question: " 'What was your understanding at the time as to " what the terms were on which you were taking " it up?' to which the defendant objected as calling

" for a conclusion of the witness, and incompetent " and not binding on the defendant in any way, but " the objection was overruled and the witness ans- " wered: 'Why I understood that I was to receive " $500 for the claim when the patent issued.' "

As a matter of fact the aforesaid question to which objection was made by plaintiffs in error, did not immediately follow the last question and answer quoted by plaintiffs in error at the bottom of page 87 of their brief. On the contrary, an entire page of questions and answers intervene, to wit: page 358 of the Transcript of Record. The question, " What was your understanding at the time as to " what the terms were upon which you were taking " it up", and the objection and the aforesaid answer appear at the middle of page 359 of the Transcript of Record.

It should be noticed that the plaintiffs in error did not save any exception to the ruling of the Court upon their objection to this question. Had they done so it must be presumed upon this appeal that the trial Court would have then and there corrected the error, if it is error. As a matter of fact, as we will presently endeavor to demonstrate, it was not error, because the evidence was offered for the purpose of proving that perjury was then and there committed by the entryman, Joel E. Calavan, before the Defendant Biggs, who was a United States Court Commissioner, and who was then examining Calavan upon his final proof. It is contended by

defendants in error that it was competent for them to prove that the entryman committed perjury as an overt act, in furtherance and in consummation of the object of the conspiracy between the defendants, Biggs, Gesner and Williamson to suborn a large number of persons, including said Calavan, to commit perjury. The fact that perjury was committed by the entrymen is a circumstance which may be taken into consideration by the jury with all the other circumstances in evidence, in determining whether or not the defendants did conspire together to suborn a large number of persons to commit perjury, as alleged in the indictment. It was material to determine what understanding the entrymen had, at the time he was making his final proof, as to what he had agreed to do with the land, as soon as he obtained the title thereto, in order to determine whether or not he was then swearing falsely in stating that he was not purchasing the land for speculation, but in good faith to appropriate it to his own exclusive use and benefit, and that he had not, directly or indirectly, made any agreement or contract in any way or manner, with any person or persons whomsoever, by which, the title he might acquire from the Government of the United States would inure, in whole or in part, to the benefit of any person except himself.

The evidence was not offered for the purpose of proving what the agreement was, if any, between the entryman Calavan and the defendants, nor as sub-

stantive evidence of what that agreement was, but it was offered solely for the purpose of proving that the entryman Calavan did not believe that the statements were true which he was then making under oath before said defendant Biggs, as United States Commissioner. In other words, it is contended by defendants in error, that upon the trial of defendants under an indictment for conspiracy to suborn a large number of persons to commit perjury, it is competent to prove that a large number of perjuries were committed by persons who were acting at the suggestion of defendants, and who were thus aiding defendants to accomplish the object which was the motive for the conspiracy of defendants. The proof of these perjuries, however, would be merely for the purpose of establishing them as facts in a chain of circumstantial evidence, and as thus tending and aiding to prove the existence of the unlawful agreement among the defendants to procure the commission of that perjury. The jury were properly instructed that they could not convict the defendants unless they believed beyond a reasonable doubt that the defendants knowingly, corruptly and wilfully procured the respective entrymen to knowingly and wilfully commit perjury.

POINT III.

The next witness whose testimony is attacked is Wilford J. Crain. See page 88 of brief of plaintiffs

in error. That part of the testimony of the witness Crain, upon which the assignment of errors is based, appears in Volume 1 of the Transcript of Record, at page 395.

The record covering the questions asked of this witness, which are quoted on pages 88 and 89 of the brief of plaintiffs in error, reads as follows:

"Q. What was your understanding as to whether
" you had promised to do that or not?

"Mr. BENNETT: We object to that, your Honor.
" Let him state the facts.

"Mr. HENEY: This goes to the question of his
" BELIEF at the time he made this.

"The COURT: He may state his belief.

"Mr. BENNETT: We object to it as incompetent,
" immaterial and not in any way binding on the de-
" fendants.

"Q. Did you believe you were obligated?

"Mr. BENNETT: That is objected to as leading.

"Q. Well, what did you believe?

"A. You mean, do I believe I was under obliga-
" tion to let them have it?

" Q. Yes.

"A. Well, I would have felt that way if I had
" went ahead and proved up on the land and they
" had furnished me the money to do it with.

"Q. Was that your understanding of it?

"A. Yes, sir.

"(Objected to as being leading and calling for
" the understanding of the witness.)"

The witness had just been shown the written statement in duplicate, or "sworn statement" so called, which he had signed and sworn to before the defendant Biggs, as United States Commissioner, when he filed upon the land described therein at the instance and suggestion of the defendants. He had also testified to the agreement which he had made with the defendants through their agent Watkins, his father-in-law. The Government was again endeavoring to prove that the entryman had actually and wilfully committed perjury in applying for the land. The statement by Mr. Heney that "this goes " to the question of his belief at the time he made " this," and the Court's reply that "he may state his belief," shows clearly that the testimony was not offered for the purpose of proving what the agreement, if any, between the entryman and the defendants was, but that it was offered only for the purpose of proving that the entryman did not believe that the statements were true which he had then and there sworn to before said defendant Biggs, as United States Commissioner.

Again it will be noticed that the question "what " was your understanding as to whether you had " promised to do that or not" was left unanswered by the witness, and that to the question, "Well, what did you believe"? there was no objection whatever made by plaintiffs in error, and that to the final question, "Was that your understanding of it", there was no objection made by plaintiffs in

error until after the witness had answered "yes, sir". The only objection made at that time was that the question was "leading and calling for the un- " derstanding of the witness". There was no objection on the ground that it was incompetent, immaterial or irrelevant. There was no motion made to strike out the answer of the witness, and there was no exception saved to the ruling of the Court upon the objection, and as a matter of fact the record shows that the Court did not rule upon the objection at all, for the evident reason that the objection was made too late, because it was made after the witness had answered.

POINT IV.

The next witness against whose testimony error is assigned, is Henry Hudson. See page 89, Brief of plaintiffs in error.

All that is called to the attention of the Court, in regard to the witness Hudson, is the following:

"So the question was asked of witness Hudson:

"Q. What did you understand at that particular " time as to whether you had agreed to sell it to " Gesner or not?"

There is no suggestion or pretense that the witness Hudson was permitted to answer the question, or that he did answer the question, or that the plaintiffs in error made any objection to the question, or that the Court made any ruling upon the same, or

that they saved any exception to any ruling of the Court upon the same. It is not even pointed out in their brief where this question can be found in the record. The aforesaid question appears in Volume 1 of the Transcript of Record, at page 473, and the record reads as follows:

"Q. What did you understand at that particular "time as to whether you had agreed to sell it to "Gesner or not?

"Mr. BENNETT: We object to that, your Honor.

"(Objection overruled. Defendants except.)

"A. Well, now, I don't know. It was kind of "an agreement; a verbal one, though."

It will be noticed that plaintiffs in error did not state any ground for their objection in this instance, and consequently the objection is totally insufficient. In this instance they did save an exception to the ruling of the Court.

This evidence was offered for the same limited purpose before stated, to wit: to prove that the entryman Hudson committed perjury at the time he signed the written statement in duplicate, or "sworn statement" so called, and swore to the truth of the same before defendant Biggs as United States Commissioner for the purpose of filing upon the land described therein at the instance and suggestion of the defendants, and to aid them in the object which was the motive for their conspiracy to suborn persons to commit perjury.

This witness had previously testified to his conversation with Gesner, in relation to the filing, which constituted an agreement to sell the land to Gesner as soon as he obtained title thereto from the government, according to the contention of defendants in error. He had just previously testified that he took the land up "for speculation". (See middle of page 473, Transcript of Record.)

POINT V.

The next witness, a portion of whose testimony is assigned as error, is Ben Jones, (See Brief of plaintiffs in error, pages 94 and 95). The aforesaid testimony of the witness Jones, which is so quoted in the brief, is found in Volume 1 of Transcript of Record, commencing on page 170.

The record, including two questions and answers immediately preceding the first one quoted by plaintiffs in error in their brief on page 94 thereof, is as follows, to wit:

"Q. Mr. Jones, at the time you signed this appli-
" cation were you sworn by Mr. Biggs?

"A. Yes, sir.

"Q. Was this paper read to you?

"A. I think it was.

"Q. Now, at the time you signed it and swore to
" it, did you intend to convey this land to Dr. Ges-
" ner for the consideration named by him to you,
" as testified by you, as soon as you obtained the title
" thereto?

"Mr. Bennett: Now, may it please your Honor, "we desire to object to that upon the ground that "the intention of this witness is not binding in "any way upon the defendants.

"The Court: The witness may testify to all the "acts, all the conversations and the circumstances, "and he may also testify to his intention, if it be "a material element involved.

"(Defendants except to the ruling.)

"A. Yes, sir.

"Q. What was your belief at the time you signed "and swore to this, as to whether or not this state- "ment in the paper was true: 'I do not apply to "purchase the land above described on speculation, "but in good faith to appropriate it to my own ex- "clusive use and benefit, and that I have not, di- "rectly or indirectly made any agreement or con- "tract in any way or manner, with any person or "persons whomsoever, by which the title I may "acquire from the Government of the United States, "may inure, in whole or in part, to the benefit of "any person except myself'?

"A. Well, if I had got the $75, it would have been "for my benefit, wouldn't it?

"Q. The $75 would have been, yes.

"A. Yes.

"Q. But what was your belief as to whether the "purpose with which you were taking the land was "to have the land for your own special use and bene- "fit?

"A. Well, I had agreed to have taken that from
" Gesner, of course; I admit that; that I did agree
" to take it from him.

"Q. Then you knew at the time that this state-
" ment wasn't true?

" A. Yes, sir."

The last four questions and answers are very appropriately omitted from their brief by counsel for plaintiffs in error. The witness Jones was the first witness called for the prosecution, upon the trial of the case at bar, and these questions and answers clearly and unequivocally establish the purpose of the testimony, to wit: that it was exclusively for the purpose of establishing the fact that the entryman Jones knew that he was swearing falsely at the time he signed and swore to his application to purchase the land before the defendant Biggs, United States Commissioner, at the instance and suggestion of defendant Gesner, and that the entryman Jones was committing this perjury for the purpose of, and with the intent of, aiding the defendants to accomplish the object which was the motive for them to suborn a large number of witnesses, including Jones, to commit such perjury, to wit, in order, as we shall presently more fully see, to enable Gesner and Williamson to protect their summer sheep range against encroachment of other persons in the same business.

It is apparent from the testimony quoted, that it was not offered as tending to prove, or for the purpose of proving, the existence of a contract between

the entryman Jones and the defendants, or either of them, by which the defendants had agreed to purchase the land, and by which Jones had agreed to convey it to them as soon as he secured title. The witness had previously testified that Dr. Gesner, in June, 1902, in Prineville, had told the witness that if he and his wife would go up there and take a claim near the clipping corrals on the Wickiup, near the Horse Heaven country, that Gesner would give them $75 a piece, when they proved up, and that witness told Gesner that he would see his wife about it, and that after seeing his wife he told Gesner that they would go ahead, and that Gesner told them what day to go up there, and that there would be others going up, and that the witness and his wife and their little boy and Joel Calavan and his wife, went up together in a hack or rig of their own, sometime in the last days of June, and that when they reached the shearing plant, which is known as the Williamson and Gesner shearing plant they found Gesner there with others, and that Gesner spoke to him about which land he was to file upon, and told him where to go to see it.

Two or three days afterwards he went before Biggs, and that Biggs had the description, he thought either Biggs or Gesner; that he filed upon it. He then identified the filing papers, and they were offered and admitted in evidence. (See Volume 1 of the Transcript of Record, pages 163 to 170, both inclusive.) Then follows the testimony hereinbefore quoted.

It will be noticed that the only objection made to the question, "Now, at the time you signed it and " swore to it, did you intend to convey this land to " to Dr. Gesner for the consideration named by him " to you, as testified by you, as soon as you obtained " the title thereto?" by plaintiff in error is as follows: "We desire to object to that upon the ground " that the intention of this witness is not binding in " any way upon the defendants". It may safely be conceded that the intention of the witness in that matter was not binding in any way upon the defendants. But it does not necessarily follow that the testimony was not competent, material or relevant. It was not objected to upon the ground that it was incompetent, or that it was immaterial, or that it was irrelevant, and no reason was specified to the Court as to why it was incompetent, or immaterial, or irrelevant. In reply to the objection, the Court said: " The witness may testify to his intention, if it be a " material element involved." If the intention of the witness was not a material element involved in the issues then being tried, it was the duty of counsel for plaintiffs in error, to point out to the Court the reason why it was not material.

The foregoing quoted testimony demonstrates the theory upon which the trial Court admitted the testimony of the various witnesses hereinbefore discussed as to their understanding and intention, at the time they were making their applications and their final proof respectively, as to what they had agreed to

do, or would do with the land as soon as they acquired title to the same.

It must be remembered that Jones was the first witness for the prosecution, and that the theory upon which the case was being tried was completely and fully exposed in the taking of his testimony, and thereafter the Court's rulings were made, in accordance with said theory.

The only other assignment of error made by counsel for plaintiffs in error, in relation to the testimony of the witness Jones, is as follows:

"Again, in relation to the final proof, the witness " was asked:

" 'Q. Mr. Jones, at the time that you subscribed " this final proof paper, what was your intention " with reference to this land as to what you would " do with it when you obtained the title?' and was " permitted to answer: 'A. Let Gesner have " it'."

It will be noticed that counsel do not put in their brief, the objection which they made to the question. Said question and answer appear in Volume 1, Transcript of Record, at page 183, but in order to understand the position of the trial Court, it is necessary to consider the testimony which immediately preceded that question and answer.

Commencing at bottom of page 180, Volume 1, Transcript of Records, it reads as follows:

"Q. At the time that you made this final proof,

" Mr. Jones, did Mr. Biggs say anything to you " about the making of a note or mortgage?

" A. No, sir.

" Q. Do you remember any conversation as to " whether you were to make one at that time?

" A. No, sir. I was not to make any.

"Q. You weren't to make one. But do you re- " call any conversation about it with Biggs?

"A. I don't remember about any with Biggs.

"Q. Do you remember having one with anyone " else?

"A. Why, I and Gesner talked about the money " proposition as far as that is concerned.

"Q. When?

"A. At the time I was to file on the timber. He " was to furnish the money.

"Q. What did he say about that?

" A. Well, he said he would furnish me the " money.

"Q. And how about your wife?

" A. He would furnish her.

"Q. Was that in the same talk where he said he " would pay the $75.

"A. Yes, I think it was.

"Q. Now, at the time you made this final proof " what was your intention as to what you would do " with the land when you got title to it?

" (Same objection.)

" COURT: It goes in subject to the same objec- " tion. I understand the objection to apply to this " question also.

" Mr. BENNETT: I think this is a little different " from the other, your Honor. It goes to the matter " of what his intention was at the time of the mak- " ing of final proof, and it may be that it depends " upon that other question that has been holding " back so that we would have some chance to pre- " sent the authorities to your Honor.

"COURT: Mr. Heney, do you contend that even if " the construction must be put upon the indictment " that the conspiracy charged was only on making " that application to enter, that this would still be " admissible testimony?

" Mr. HENEY: I believe that it would be, if your " Honor pleases, as tending to throw some light " upon the question as to what the intent of the " party was at the time the original entry was made; " that it is a part of the res gestae of the trans- " action. If perjury was suborned for the original " statement, the purpose of it was to secure title " to the land for Gesner, and that anything done " that could have been in contemplation of the " parties at the time is necessary to be done in order " to complete that purpose would be a part of the " transaction, which would be competent evidence to " show the intent with which the other part was " done.

"The COURT: I am inclined to think that that is " the correct rule; on general principles I think that " would be the correct view to take of it; unless " there is some rule that would be different appli- " cable to this particular charge, I should so hold.

" Mr. BENNETT: I had supposed that the decision " of Judge De Haven in the matter had become the " law of the case in all these questions, whether " favorable or unfavorable, and therefore, I am " not prepared at this time to present this matter " carefully.

" (Argument.)

" (Objection overruled. Defendants except.)

" Q. Mr. Jones, at the time that you subscribed " this final proof paper, what was your intention " with reference to this land as to what you would " do with it when you obtained the title?

" (Same objection. Objection overruled. De- " fendants except.

"A. Let Gesner have it.

"Q. Under that agreement?

"A. Yes, sir.

"Q. After you had made your final proof, did you " receive money back from the land office?

"A. Yes, sir; checks.

"Q. One for yourself and one for your wife?

"A. Yes, sir.

"Q. Are these the checks and is that your signa- " ture on one of them and here on the other?

"A. This is mine and this is hers.

"Q. Did you receive a letter with those?

"A. I couldn't say. I don't believe I did.

"Q. You don't remember what you did with it " if you had one?

A. No. I don't remember. There might have been

" a note in there with it from the land office. I " believe there was.

"Q. Yes. I mean from the land office?

"A. Yes, sir.

"Q. These came to you from the land office by " mail?

"A. Yes, sir.

"Q. What did you do with them when you got " them?

"Q. (JUROR.) From the land office at The Dalles?

" Mr. HENEY: Yes. The date of this is January " 25, 1904. Both of these checks.

"Q. At the time these were returned to you had " you given any indication to the land office or land " officers, in any way, that you did not desire to go " ahead with that entry?

"A. At that time?

"Q. Yes.

"A. No, I had not.

"Q. Now, then, you received these from the land " office?

"A. Yes, sir.

"Q. And what did you do with them when you " got them?

"A. I put them in the bank there at Prineville, " the First National Bank, to Gesner's credit.

"Q. Did you see him before doing so? Talk with " him any?

"A. I don't remember whether I did or not, now.

"Mr. HENEY: We will offer these two checks in

" evidence. That is the amount paid to the land " office, $411 on each check, and it is a check of " Anne M. Lange as receiver of the land office at " The Dalles, payable, the first one to B. F. Jones, " endorsed B. F. Jones, and there are several banks' " stamps on there.

"(Marked Plaintiff's Exhibit No. 5.)

"Mr. HENEY: The second one is the same way, " 'Pay to Nancy D. Jones.' Same date, January " 25, 1904, $411. Anne M. Lange, Receiver. En- " dorsed, Nancy D. Jones.

"(Marked Plaintiff's Exhibit No. 6.)

"Q. Have you done anything further with refer- " ence to the land since?

"A. No, sir.

"Q. Have you received a patent for it yet?

"A. No, sir."

It will be noticed that the only objection made by the defendants to the question in controversy is in the following language: "Same objection". It is impossible to tell what counsel for plaintiffs in error mean by these words, because his next preceding objection was in exactly the same language (See Transcript page 181), and his next objection preceding the one on page 181 is found at the bottom of page 174, and is as follows: "We object to that on " the part of each of the defendants as incompetent " (objection withdrawn)." And the next objection preceding that is on page 173, and is as follows: " Our objection goes to that", and the next objec-

tion preceding that is at the top of page 173 and is as follows: "Same objection. I suppose our ob- " jection may go to all of this." The next objection preceding that is on page 172, and is as follows: "Objected to as incompetent, immaterial and hear- " say". This last objection was directed toward a " question as to a statement made by the witness " Jones to his wife, at the request of Gesner, to the " effect that Gesner wanted her to file on a piece of land, and that Gesner would furnish the money and pay her $75 for doing so. It is evident that no sufficient objection was made to the question assigned as error, on page 95 of the brief of counsel for plaintiffs in error. Moreover, it must be apparent that the testimony was not offered for the purpose of proving or tending to prove that a contract for the sale of the land existed between Jones and Gesner. On the contrary, it was offered solely for the purpose of showing that Jones wilfully and knowingly swore falsely in making his final proof.

At page 182, Transcript of Record, Mr. Bennett, of counsel for plaintiffs in error, says: "It goes to " the matter of what his intention was at the time " of the making of final proof, and it may be that " it depends upon that other question that has been " holding back so that we would have some chance " to present the authorities to your Honor." By that sentence Mr. Bennett meant the question as to whether or not perjury could be based upon false swearing at the time of final proof, in answer to

questions propounded by the General Land Office, for the purpose of determining whether or not the applicant was desiring to purchase the land for speculation, or whether it was being purchased in good faith by him to be appropriated to his own exclusive use and benefit, and whether he has directly or indirectly made any agreement or contract in any way or manner, with any other person or persons whomsoever, by which the title which he might acquire from the Government in and to such land, should inure in whole or in part to the benefit of any person except himself. It was contended by plaintiffs in error that this false swearing at the time of final proof in regard to those questions, did not constitute perjury, because the Timber and Stone Act did not expressly and specifically require the applicant to give such testimony at that time; whereas it was contended by defendants in error that it did constitute perjury, because the rules and regulations of the land department required the applicant to answer those questions at that time, in order to enable the department to determine whether or not he was endeavoring in good faith to purchase the land for his own exclusive use and benefit, and not for speculation.

The issuance of the final receipt to all these lands was delayed because, after the majority of the filings had been made, the General Land Office discovered that enumerable frauds were being committed in the State of Oregon and elsewhere, and the

Secretary of the Interior caused all applications to be suspended, where the final proof was made before some officer other than the Register and Receiver, until an agent of the Land Office could first visit the applicant and cross-examine him, in regard to the bona fides of his purchase; that is to say, in regard to whether he was endeavoring to purchase the land for speculation or for the use and benefit of another. Finding that it would take considerable time to accomplish this, a general order was issued for the return of his purchase money to each applicant whose application to purchase was under suspenion. If no suspension order had taken place, and Jones had promptly received his final receipt, after making final proof, and had immediately thereafter conveyed the land by good and sufficient deed to the defendant Gesner, and had received in consideration of such deed the sum of $75, it could hardly be doubted that, under this indictment, it would have been proper to prove all these facts as part of a chain of circumstantial evidence tending to prove the existence of the conspiracy alleged in the indictment.

But, if it would be proper to prove that Jones actually conveyed the land to Gesner as soon as he received his final receipt, it is difficult to understand why it would not be equally proper to prove that, at the time he made his final proof, it was his intention to convey the land to Gesner just as soon as he secured his final receipt, because the fact that he en-

tertained the intention of making the conveyance at the very time of making final proof is a slightly higher degree of evidence as a link in such a circumstantial chain than the actual conveyance itself immediately after securing the final receipt would be. This is true for the reason that immediately after he had secured his final receipt he would have the lawful right to sell and convey the land. Moreover, proof that he did convey the land immediately after obtaining his final receipt would be important as evidence only because the inference could properly be drawn therefrom that he entertained the intention of makig such conveyance at or before the time he made his final proof. Consequently, the direct testimony of Jones as to what his intention was in this respect, at the time of making final proof, is a higher degree of evidence.

In *White v. State,* 53 Indiana, 596, the Court said:

> "Because the intention is a fact which cannot in the nature of things be definitely known to others, and is hence a matter about which other witnesses cannot directly testify, does not in our opinion affect the rule that it is admissible."

In *Holmes v. Goldsmith,* 147 U. S. at page 164, the Supreme Court says:

> "As has been frequently said, great latitude is allowed in the reception of circumstantial evidence, the aid of which is constantly required, and, therefore, where direct evidence of the fact is wanting, the more the jury can see of the surrounding facts and circumstances the more correct their judgment is likely to be.

'The competency of a collateral fact to be used as the basis of legitimate argument is not to be determined by the conclusiveness of the inferences it may afford in reference to the litigated fact. It is enough if these may tend, even in a slight degree, to elucidate the inquiry, or to assist, though remotely, to a determination probably founded in truth.'

"The modern tendency, both of legislation and of the decision of courts, is to give as wide a scope as possible to the investigation of facts. Courts of error are specially unwilling to reverse cases because unimportant and possibly irrelevant testimony may have crept in, unless there is reason to think that practical injustice has been thereby caused."

In the case of *People v. Bentley,* 75 Cal. at page 409, the Court says:

"A conspiracy, like most other facts, may be proved by circumstantial evidence. Indeed, it is not often that the direct facts of a common design, which is the essence of a conspiracy, can be proven otherwise than by the establishment of independent facts, bearing more or less remotely upon the main central object, and tending to convince the mind reasonably and logically of the existence of the conspiracy.

"In the language of Greenleaf: 'If it be proved that the defendants pursued by their acts the same object, often by the same means, one performing one part and another another part of the same so as to complete it, with a view to the attainment of the same object, the jury will be justified in the conclusion that they were engaged in a conspiracy to effect that object.' (3 Greenl. Ev., sec. 93; United States vs. Doyle, 6 Saw. 612.)"

In *Brown v. United States,* 142 Federal Reporter, 1, decided August 1, 1905, the defendant on trial, was charged with aiding and abetting an officer of a national bank, in the misapplication of bank funds by lending the same to an insolvent corporation, of which defendant was president, and it was held that evidence that such officer of the bank, Broderick, also lent money of the bank to other insolvent corporations is admissible, as tending to show his intention in making the loans charged.

It would clearly have been equally proper to have proven the intention of the bank officer by his own testimony. It cannot be possible that the mere inference to be drawn from similar acts performed by him is a higher degree of evidence than his own direct testimony under oath, as to what his intention was. In this case, the bank officer was not on trial, and evidence of the intention which he had in withdrawing the money from the bank was admitted as against the defendant, as tending to prove the charge that the defendant aided and abetted said bank officer in the misapplication of the bank funds by lending the money to an insolvent corporation of which the defendant was president.

In the case at bar, each applicant, as shown by the testimony, was an accomplice of the defendant in the commission of the crime of perjury, and, likewise, in a conspiracy to defraud the government of the United States out of a certain proportion of its public lands. Moreover, the counsel for

plaintiffs in error requested and secured an instruction to the jury by the trial Court to the effect that if they believed as to each of said witnesses who had so applied to purchase lands that he had entered into an agreement with defendants to convey the land to them, or any one of them, as soon as he secured title to the same, the jury should weigh his evidence with great caution and closely scrutinize it. (See Volume III, Transcript of Record, pages 1458, 1459 and 1460.)

In the case of *Commonwealth v. Smith* (Mass. 1895), 40 N. E. Rep. 189, it was held that on the trial of four aldermen for conspiracy to procure money to be paid to themselves for their votes for granting licenses, evidence by a witness that, while the conspiracy was in force, he and others were paying money in order to get licenses, and that one of the aldermen had received the money, is material.

So, likewise, in the case at bar, where the defendants are tried for conspiracy to suborn a large number of persons to commit perjury, it is material to show that the persons suborned did actually commit such perjury.

In *Lamb v. the State,* Supreme Court of Nebraska, 1903, 95 N. W. Rep. 1050, it was held that, where the defendant was on trial for instigating and procuring another person to steal cattle, the Court held that the declarations of the affiant as to his intention while engaged in the perpetration of the crime, were admissible in evidence.

In the *Cyclopaedia of Law and Procedure,* Volume 8 at page 685, it is said:

> "The evidence in a conspiracy is wider than perhaps in any other case. Taken by themselves, the acts of a conspiracy are rarely of an unequivocally guilty character, and they can only be properly estimated when connected with all the surrounding circumstances." (Citing Roscoe Crim. Evidence 88, approved in People v. Saunders, 25 Mich. 119.)

It is admitted by plaintiffs in error (see page 96 of their brief), that if the charge had been subornation of perjury, the intention of the applicants at the time of making their preliminary applications, and at the time of making their final proofs, might have become a substantive element of these offenses. As a matter of fact, the intention of the applicants in the foregoing brief is a substantive element of the offenses charged in this indictment, and is proveable under the allegations of the indictment, because the Timber and Stone Act makes such intention of the applicant a material element in that substantive law which the defendants in this indictment are charged with having conspired to suborn a large number of persons to commit perjury, in order to successfully violate and evade material provisions of.

The indictment itself charges that the defendants conspired to instigate and procure a large number of persons to commit the offense of perjury by taking their oaths that certain declarations and depositions

by them to be subscribed were true, and thereupon, contrary to such oaths, stating and subscribing material matters contained in such declarations and depositions which they should not believe to be true; that the timber lands which those persons would then be applying to enter and purchase in the manner provided by law, were not being purchased by them on speculation, but were being purchased in good faith to be appropriated to the exclusive use and benefit of those persons respectively, and that they had not, directly or indirectly, made any agreement or contract in any way or manner, with any other person or persons whomsoever, by which the titles which they might acquire from the said United States in and to such lands should inure in whole or in part to the benefit of any person except themselves, when in truth and in fact, as each of the said persons would then well know, and as the defendants would then well know, such persons would be applying to purchase such lands on speculation, and not in good faith to appropriate such lands to their own exclusive use and benefit respectively, and would have made agreements and contracts with said defendants by which the titles which they might acquire from the United States in such lands would inure to the benefit of said defendants, Williamson and Gesner, and the matters so to be stated subscribed and sworn by the said persons being material matters under the circumstances, and matters *which the said persons so to be suborned,*

instigated and procured, and which the said defendants *would not believe to be true.*

It must certainly be competent under such an indictment to prove that the persons who were suborned to make such applications and entries of lands, did make such false statements at the time of making such applications and at the time of making their depositions in relation to the same, and that they intended to make such false statements, or in other words, that they wilfully swore falsely in relation to such matters, or in other words that they had such an understanding of the matters about which they were called upon to testify that they could not then and there have believed their own statements so then and there made to be true.

Of course, we do not mean to be understood as asserting that it is necessary to allege that the purpose of the conspiracy was accomplished, or that if it is alleged in the indictment that the purpose of the conspiracy was accomplished, it is necessary to prove it.

At common law, conspiracy was a misdemeanor, and if the conspiracy was to commit a felony and the purpose of the conspiracy was accomplished the crime of conspiracy was immediately merged into the higher crime of felony; and if it were proven upon the trial of the conspiracy charge that the purpose was accomplished a conviction for the conspiracy could not be had. Where, however, the conspiracy was to commit a misdemeanor there was no

merger, if the purpose of the conspiracy was accomplished, and it has never been doubted that it was proper upon the trial of the conspiracy to prove the accomplishment of the purpose as a fact or circumstance in connection with other facts and circumstances as tending to prove the existence of the conspiracy.

In the case at bar the defendants are charged with conspiracy to procure a large number of persons to commit perjury by falsely swearing that each one was applying to purchase a certain piece of land in good faith to be appropriated to his own exclusive use and benefit and not for "speculation". One of the objects of the conspiracy, therefore, was to have each applicant swear that he was not applying to purchase the land for "speculation", whereas, in truth and in fact he was so doing. The intent of each applicant in this respect at the time he was applying to purchase the land becomes material for the purpose of proving that the object of the conspiracy in this respect was consummated. We concede that it is not necessary to prove that the object of the conspiracy was consummated, but it is certainly proper to do so, for the reasons hereinbefore stated, and if it is proper to do so the testimony of the applicant as to what his intention was at the time he was subscribing and swearing to the truth of his preliminary application papers and at the time he was subscribing and swearing to the truth of his deposition upon making final proof is the most

satisfactory kind of evidence which can be produced. It is competent evidence when the intent or motive of the witness or party is a fact permissible to be proved upon the substantive law involved in the case for the purpose of showing the nature of the transaction.

> "In conspiracy cases in the reception of circumstantial evidence great latitude must be allowed. The jury should have before them every fact which will enable them to come to a satisfactory conclusion."
>
> *8 Encyclopedia of Law and Practice,* p. 678.

> "Much discretion is left to the trial Court in a case depending on circumstantial evidence and its ruling will be sustained if the testimony which is admitted tends, even remotely, to establish the ultimate fact."
>
> *Id.* 679.

Counsel for plaintiffs in error at page 95 of their brief assign error as to the witness Evans, who was also an applicant to purchase land. The testimony of the witness, Jeff Evans, which is so assigned as error, will be found in Vol. 1, Transcript of Record, at page 431. By referring to the record it will be seen that the attorneys for plaintiff in error made no objection whatever to the first question quoted in their brief in relation to the witness Evans, nor to any of the other questions and answers of that witness which are quoted in their brief at pages 95 and 96. The brief states that the defendants objected to the following question upon the ground

that it was incompetent, immaterial and not binding upon them, to-wit:

"Now, at the time you signed that paper what " was your intent as to what you would do with the " land when you secured a patent to it?"

It is not contended in their brief that the Court made any ruling upon their alleged objection nor that they saved any exception to any such alleged ruling. The record shows that there was no objection, no ruling, and no exception.

The testimony of Jeff Evans, which immediately precedes that which is quoted in the brief of counsel for plaintiffs in error is instructive, and we quote it for the benefit of the Court. It commences on page 429 of the record and ends on page 431 of the record, immediately preceding the aforesaid question which is so assigned as error by counsel for plaintiffs in error in their brief.

" Q. Do you remember, at the time of swearing " to this paper, of reading or having read to you " this statement in it? 'That I do not apply to pur- " 'chase the land above described on speculation, " 'but in good faith to appropriate it to my own " 'exclusive use and benefit, and that I have not " 'directly or indirectly made any agreement or con- " 'tract in any way or manner with any person or " 'persons whosoever by which the title I may ac- " 'quire from the Government of the United States " 'May inure in whole or in part to the benefit of any

" 'person except myself?' Do you remember any
" talk about that?

" A. Well, I think I read the paper myself, and
" I asked Mr. Biggs how that would be and he said
" that as long as I did not make any contract I could
" go ahead and prove up on the land. That this
" that I would get out of it would be for my own
" benefit.

" Q. What did you understand by contract?

" Mr. BENNETT: I object to that as incompetent;
" the language speaks for itself. If he did not un-
" derstand Mr. Biggs' language it is not our fault.

" (Objection overruled. Defendants except.)

" Q. What did you understand then by the word
" 'contract'?

" A. Well, I supposed by making a contract that
" I would have to go into writing, that I would turn
" this land over to him or he would pay me, as long
" as I did not sell and take something on it, or sign
" a contract, that it was all right.

" Q. Did Biggs say anything about that to you,
" as to his idea?

" A. Yes, sir, he said that a man could prove up
" on a piece of land that way all right; it was all
" right as long as he hadn't made any agreement,
" and the way I understood it was that a man would
" have to go in writing.

" Q. Did he say anything about writing, himself?

" A. No—well, yes, he said that a man would
" have to go into writing or a contract.

"Q. Did you say for, or did you say or contract?
"A. For a contract."

Similar testimony was given by a number of witnesses including several, if not all of those whose testimony is assigned as error by counsel for plaintiffs in error, and which is hereinbefore discussed. Many of the applicants were ignorant, and the defendant Biggs took advantage of their ignorance by advising them that they had not entered into an agreement for the sale of the land which they were then applying to enter, such as is denounced in the Timber and Stone Act, unless the applicant had signed a written agreement to that effect. Biggs further explained to them that they could safely swear that they were taking up the land exclusively for their own benefit, respectively, because the profit which each applicant would make out of the land was for his own exclusive benefit. Even the witness, Joel Calavan, who was a school-teacher, testified that Biggs had explained both these matters to him in the same way, and that he so understood the transaction. The jury were entitled to have all the facts and to determine therefrom whether or not the witness testified truthfully in this respect as in all others. It was material for the jury to know whether or not these applicants had actually committed perjury in these particulars at the time of subscribing and swearing to their preliminary application papers before the defendant Biggs and at the time of subscribing and swearing to the truth of their deposi-

tions upon making final proof before the defendant Biggs as facts of greater or less weight constituting links in the chain of circumstantial evidence tending to prove a conspiracy between the defendants to procure a large number of persons, to-wit, those applicants and others to commit perjury in those particulars.

There is one other witness whose testimony in this particular is assigned as error by counsel for plaintiffs in error, at page 96 of their brief, to-wit: Christian Feuerhelm. All his testimony so assigned as error will be found in Volume 2, Transcript of Record, at bottom of page 546 thereof. An examination of the record discloses the following condition of the matter, to-wit:

"Q. You don't understand the question. At "the time you filed, did you intend to let Dr. Gesner "have the land when you got the title—at the time "you were signing that paper—filing?

"A. I guess I thought so.

"Q. You did think so?

"A. I think so."

It will be noticed that no objection whatever was made to the question by counsel for plaintiffs in error, although in their brief at page 96 they make the following statement, to-wit:

"To which defendants objected as incompetent, "immaterial, calling for a conclusion of the witness "and not binding upon them. Objection was over-"ruled and the witness answered."

The aforesaid testimony occurred upon the redirect examination of the witness after he had testified fully under cross-examination as to what he intended that he would do with the lands at the time he was filing upon the same.

It is respectfully submitted that upon the condition of the record as to these respective assignments of error the Appellate Court would not be warranted in interfering with the judgment even if the aforesaid testimony was improperly admitted.

But there is another substantial reason why the witnesses were permitted to testify as to their intentions and understanding at the time they filed upon the land and at the time they made their respective final proofs upon the same.

The record discloses the fact that all of the applicants were reluctant to admit under oath that they had wilfully committed perjury. With the exception of the entryman Jones they were practically all unwilling witnesses. One of them, John F. Watkins, testified in part as follows, under cross-examination by Mr. Bennett:

"Q. Didn't you testify at the first trial of this " case, Mr. Watkins, in answer to the question, 'As " 'a matter of fact, you held the land at a whole lot " 'more than you had any idea they would give you " 'for it, didn't you? You held it at $1,000, didn't " 'you?' and did you answer, 'Yes, I calculated to " 'ask him $800 or a $1,000 for it when the time " 'came to sell it to him.'

" A. I think I did, but I done it to favor them " men.

" Q. Done it to favor what men?

" A. These men indicated here. I didn't want " to swear a straight lie, but I did all I could with- " out it.

" Q. Do you mean to say that at the other trial " of this case you swore to a lie to favor them?

" A. I don't think it is hardly a lie. I might " have calculated on that date, but that was not the " understanding and that is not what I would have " done with it.

" Q. Was this true or false? You say you did " testify that? Was it true or false that you con- " templated asking him $800 or $1,000 for it when " the time came to sell it?

" A. Well, I don't know as it was true, and it " was not false, I thought of doing that after I made " final proof. I never thought of it before.

" Q. You thought of doing that after you made " final proof?

" A. Yes.

" Q. And you say now you testified in that way " at the other trial in order to favor the defendants?

" A. Yes.

" Q. And not to tell the truth?

" A. If I testified to do that, I don't know " whether I testified to do it before I made final " proof.

" Q. Well, you know whether you testified to it " to favor them, or not, don't you, Mr. Watkins?

"A. Yes, sir; I done it to favor them.

"Q. You done it to favor them?

"A. Yes, sir.

"Q. You do remember then, that you so tes-
"tified?

"A. Well, I think I did; I aimed to do that. I
"don't remember what I testified to, but after I
"made final proof, I intended to turn it over to
"them just as I agreed to do. I don't know what
"I testified to, exactly; I don't remember.

"Q. Did you testify at the other trial in answer
"to the question, 'And if they would give you as
"much as anybody else, you would give them the
"advantage? If they would give you just as much
"as anybody else, you would let them have it?
"That was your intention?' And did you answer
"that 'Yes'?

"A. I think I did.

"Q. And in answer to the question, 'And if they
"'would not, you would let somebody else have it?'
"And did you answer, 'Yes, or that I was free
"'to do that.'

"A. I don't remember what I answered.

"Q. You don't remember whether you answered
"that way or not? I suppose that if you did answer
"that way, you answered to favor the defendants?

"A. That is what I did."

See Vol. 1, Transcript of Record, pp. 313 to 316, both inclusive.

And again at page 320 and 321 of the Transcript of Record, the same witness Watkins under cross-examination, says:

"Q. Now did you also tell Doug. Lawson in the " presence of Green Beard and Henry Beard that " you were going to swear there was a contract to " save yourself from indictment, that you did not " think there was any contract, but you were going " to swear there was to save yourself from indict- " ment?

" A. No.

" Q. That being about on the 23d or the 24th of " August, about 10 o'clock, at the Albany room?

" A. That I knowed there was no contract. " That I was going to swear there wasn't one?

" Q. That you were going to swear there was a " contract to save yourself from indictment; that " you did not think there was any contract, but that " you were going to swear that there was to save " yourself from indictment?

" A. I don't remember anything of the kind. I " never swore yet there was any contract.

" Q. What say?

" A. I never swore yet there was any contract.

" Q. You haven't sworn there was any contract?

" A. I don't know what it takes to make a con- " tract. There was a fair and square understanding " about, but I don't know whether it is a contract " or not. I don't know what it takes to make a " contract—a verbal contract.

" Q. You don't know what it takes to make a " contract?

" A. No, not a verbal contract, I don't."

And again at page 326 of the record, under cross-examination, witness Watkins testified as follows:

" Q. Mr. Watkins, at the time you made these " sworn statements that were offered in evidence " here, did you believe them to be true?

" A. You mean the first ones?

" Q. Yes.

" A. Well, I didn't realize there was anything " wrong about them; I did not investigate it enough " to know.

" Q. Did you believe them to be true?

" A. What I said?

" Q. Yes.

" A. No, I don't know as I did.

" Q. What you swore to there?

" A. I never stopped to realize about it; I " thought it was all right, and Biggs told me I was " making no contract, that it was simply an under-" standing.

" Q. Well, you did not have any understanding; " you had not had any talk with Gesner at all, had " you?

" A. No, but what talk I had with Mr. Biggs and " their connections with the matter made me know " there was something in it.

" Q. Oh, you had an idea that you were expected " to convey?

" A. Yes, sir.

" Q. But you hadn't any arrangement with Ges-
" ner about that at all?

" A. Nothing, only from others, no sir. I never
" had spoke to Gesner until that time about it.

" Q. You testified at the first trial that you be-
" lieved those statements to be true, didn't you, when
" you made them?

" A. I don't know what I testified to.

"Q. Biggs told you, if you had made any con-
" tract to sell the land, you could not sign the affi-
" davit, didn't he?

" A. Yes.

" Q. Did he?

" A. Yes, sir.

" Q. When was it Biggs told you that?

" A. I think he told me twice; I think he told
" me the first time I ever talked to him about it,
" and he told me when I went up in the timber. He
" said, if I hadn't made any contract with Dr. Ges-
" ner it would simply be an understanding.

" Q. And he told you that you could not make
" any contract and then sign the affidavit properly,
" didn't he?

" A. That is what he did. He said I could not
" contract to sell the land before I proved up on it.

" Q. Yes, you could not contract to sell the land
" before you proved up on it. That was the first
" talk he had with you?

" A. I believe he told me that then, and I think
he told me before I went up in the timber too.

"Q. He told you two different times?

"A. I think so. He told me I was making no "contract; it would just simply be an understand- "ing between us that I was to convey the land when "I got the patent to it.

"I don't remember whether I did or not."

And again at page 337 of the record the witness testified as follows:

"Q. At the time your wife relinquished, or about "that time, did you receive any word from Dr. Ges- "ner by letter?

"A. No, I didn't get no letter from him then.

"Q. This letter was after they had relinquished "and before you had made final proof, or after- "wards?

"A. After I had made final proof, I think.

"Q. You got a letter from Dr. Gesner?

"A. Yes.

"Q. What did you do with it?

"A. I destroyed it.

"Q. What was the substance of it?

"A. It was that I had better relinquish my "claim; that we would get into trouble over the "Government, he was afraid if we went ahead any "further."

And again, upon re-cross examination, at page 339, the witness testified as follows:

"Q. What do you say now? Do you say now "you would have sworn to a lie and had your wife, "for $75?

" A. No, I would not. If I had thought there " was any lie about it I would not have had anything " to do with it. I knowed it was not exactly " straight, but I didn't think a man was swearing to " a lie—everybody was doing that, as Mr. Biggs " said, and there was nothing particularly wrong " about it.

" Q. Did you understand that it was not straight " and yet was not a lie?

" A. I didn't think it was exactly according to " law.

" Q. And yet you didn't think it was a lie?

" A. Yes, I didn't think I was swearing to any " lie about it, I didn't realize it.

" Q. Didn't realize it?

" A. No, I didn't.

" Q. As a matter of fact, you was not swearing " to any lie about it, was you?

" A. I don't know whether I was or not. It " looks kind of like it now to me.

" Q. What?

" A. It looks kind of like it to me now.

" Q. You think you were, now?

" A. It looks kind of like I was.

" Q. When did you begin to think you was " swearing to a lie?

" A. When this thing begin to investigate."

So also the witness Henry Hudson, Vol. 2, Transcript of Record, at page 485 thereof, testified as follows:

"Q. Did you receive a letter from Gesner?

"A. Yes, I did.

"Q. At the time Neuhausen was up there?

"A. No, it was before that.

"Q. How long before?

"A. Well, I think it was a week, or a week or " two, or such a matter.

"Q. What did you do with that letter?

"A. I burned it.

"Q. What was the substance of that letter?

"A. Well, he told me I better relinquish; that he " did not want us people in trouble up before the " grand jury, and I think he said that Moody was " on the back of it."

So also the witness Christian Feuerhelm, in Vol. 2, Transcript of Record, commencing at the bottom of page 547 thereof, testified as follows:

"Q. When you went and talked to him (Gesner) " about getting money from him, tell us what it " was that you said, and what he said, to the best " of your recollection; just what was said.

" A. Well, I answered this question a little while " ago.

" Q. I know it, but I want you to answer it " again now; your own way. I want you to tell " what it was.

" A. Well, I went over to him and asked him if " he wanted to have me to take up a claim, and he " says 'yes', and that is all I remember. He told " me to go into Biggs' office and he would fix it.

"Q. Well, wasn't something said about the money
" —or whether he would buy it or not?
" A. Yes, sir. He told me that he would give
" $500 for it after I made a deed, and that is all
" we spoke together."

This testimony was given on re-direct examination.

Upon the recross examination counsel for plaintiffs in error induced the witness to testify as follows:

"Q. He said he would give $500 when you got
" a title, didn't he?
"A. He told me he would give $500 for it when
" he got a deed, you know.
"Q. If you wanted to sell it. Ain't that what
" he said?
"A. That might be said. I couldn't say ex-
" actly.

And then upon a redirect examination at page 549 the witness testified as follows:

"Q. Now, did he say, 'if you want to sell it,' or
" did he put that in there at all?
"A. Well, I can't remember if he did say that.
" Q. Well, what is your best recollection as to
" whether he did or did not say 'if you want to
" sell'; whether he put that in? What is your
" best recollection as to whether he did or did not?
"A. Well, I can't answer that.

"Q. You can give your best recollection.

"A. I think that hasn't been said."

And at page 534 of the record the same witness, Christian Feuerhelm, testified as follows:

"Q. Now, then, do you remember the time that " Mr. Neuhausen was up in Prineville in 1904?

"A. Yes, sir.

"Q. You know him, don't you; that gentleman " sitting there?

"A. Yes, sir.

"Q. About that time, did you receive a letter " from Dr. Gesner?

"A. Yes, sir.

"Q. Is that the letter?

"A. I couldn't say; I guess it is. It has my " name on it.

"Q. What did you do with the letter which you " received?

" A. I gave it to Mr. Neuhausen."

Thereupon the letter was admitted to be the one which was given by Feuerhelm to Neuhausen at that time and it was offered and admitted in evidence, and appears at page 535 of the record and reads as follows:

"PRINEVILLE, ORE., May 13, 1904.

" Mr. Feuerhelm, Prineville, Ore.

"Dear Sir: That timber claim of yours and all " of the balance I have got to throw them up. " I am sure we would get into trouble over them

" before we got through with them, and then be " turned down on them. I know that Mr. Moody " and the Dalles Land Office are laying for us. " I do not want to get into any trouble over them, " and do not want any of my friends to get into " trouble. You go before Mr. Biggs and relin- " quish your claim.

"Yours respt.

"V. GESNER."

And thereupon the following questions were asked of the witness and the following answers made by him:

"Now, after getting that letter, did you do as " requested? Did you go and relinquish?

"A. Yes, sir.

"Q. Is that your signature?

"A. Yes, sir.

"Q. Before whom did you go?

"A. Before Mr. Biggs."

The paper shown the witness was his written relinquishment, dated May 14, 1904, and was offered and admitted in evidence.

In Vol. 1, at page 398 of the record, witness Wilford J. Crain, after testifying that he relinquished at the request of Gesner and that he and George Gaylord relinquished at the same time and then went to the office of Gesner and Williamson to get back their filing fees, testified as follows:

"Now, who was in Gesner's office when you got
" there?

"A. Mr. Williamson and Dr. Gesner.

"Q. What, if anything, was said while you were
" there? State all that was said that you can re-
" member.

"A. I don't remember much about what was
" said. Gesner wrote me out a check for the money
" what I was out for the fees for me and my wife.

"Q. Did you say anything to him about it be-
" fore he wrote it?

"A. I don't remember now whether I did or
" not.

"Q. I believe it was $19.50?

"Q. Do you remember how it was signed?

"A. No, sir; I do not.

"Q. What did you do with it after you got it?

"A. Put it in my pocket.

"Q. Well, what did you do with it after that?

"A. Why, I cashed it. I don't know when it
" was, whether it was the same day or not.

"Q. You went to the bank yourself, did you?

"A. Yes, sir.

"Q. On the Prineville bank?

"A. I think I did.

"Q. Did you see Gaylord get one?

"A. Yes, sir.

"Q. At the same time?

"A. Yes.

"Q. Was Williamson present when you received
" it?

"A. Yes, sir.

"Q. Well, Mr. Williamson said that he didn't " think it would be hardly safe to go ahead and " try to make final proof on the claims now that " there was—I believe he said Hitchcock was mak- " ing a little kick about timber frauds or something " in regard to that. He went ahead and read a lit- " tle sketch in the paper to us, in the 'Oregonian', " I believe it was, in regard to that. I don't re- " member just how it read now.

"Q. Anything said about taking up a claim " later?

"A. Yes. He said he thought later on we could " go ahead and file again and go ahead and prove " up on the claims."

The trial Court recognized the fact that the applicants were unwilling witnesses and were in effect accomplices of the defendants in the crime of perjury which was committed by them and likewise in the conspiracy to defraud the United States out of a certain portion of its public lands, and besides giving the instruction hereinbefore referred to in relation to the testimony of accomplices at the instance and request of counsel for plaintiffs in error, the trial Court permitted the prosecution to lead these particular witnesses whenever it appeared necessary to do so, and likewise to cross-examine them.

The importance and necessity of permitting the cross-examination of just such witnesses by the

prosecution is recognized by the Supreme Court of the United States in the case of *United States v. Budd,* 44 U. S. at page 165, in the following language:

> "With regard to the two defendants, they having once sworn that there was no agreement, there was nothing farther to disclose. If the government doubted their statements under oath, it could have called either one and cross-examined him to its satisfaction. It is familiar law that where a witness discloses in his testimony that he is adverse in interest and feeling to the party calling him, the latter may change the character of his examination from a direct to a cross-examination, and the opposing party is always adverse in interest. In Clarke v. Saffery, Ryan & Moody, 126, in which the plaintiff's counsel called the defendant as his own witness and sought to cross-examine him, Chief Justice Best said: 'If a witness, by his conduct in the box, shows himself decidedly adverse, it is always in the discretion of the judge to allow a cross-examination; but if a witness called, stands in a situation which of necessity makes him adverse to the party calling him, as in the case here, the counsel may, as matter of right, cross-examine him.' See also People v. Mather, 4 Wend. 229; Bank of Northern Liberties v. Davies, 6 W. & S. 285; Towns v. Alford, 2 Alabama, 378."

The examination of the entrymen as to whether they had an "understanding" with Gesner was a perfectly legitimate cross-examination after some of them testified that they had no "contract" with him and especially after some of them testified that Biggs told them that they "could have an under-

standing but could not have a written contract", and particularly after some of them had testified that they understood that a "contract" had to be in writing or it would not be a contract. So, also, it was perfectly legitimate cross-examination to ask entrymen, who had so testified, what their "intention" was, as to conveying the land at the time they filed and made final proof, respectively.

POINT VI.

Other errors which are relied upon by plaintiffs in error in their brief commencing at page 98 thereof relate (a) to the admission of evidence as to the character of the land upon which the applicants filed, to wit, to the effect that it was not chiefly valuable for its timber, and that it was in fact less valuable for its timber than for grazing purposes; (b) and to similar offenses committed by the defendant Gesner cotemporaneously with the offense upon which he was being tried and in relation to lands which constituted an essential part of his general plan to acquire the control of a certain sheep range by acquiring all public lands, either State or United States, which were for sale within a certain area, so as to have all the lands so purchased make a compact body of land as nearly as possible.

It is also contended by plaintiffs in error that the aforesaid evidence was not admissible in rebut-

tal, even if it would have been admissible as a part of the main case of the prosecution. This contention is not tenable for the reason that such evidence is only admissible for the purpose of showing intent and knowledge or to prove the falsity of the defendant's theory of defense. Each and all of the defendants testified in their own behalf in the case at bar, and admitted certain facts but denied the alleged guilty intent with which they were done. Moreover, the defendants Gesner and Williamson testified to the reasons which caused them to suggest to the applicants that they should file upon the land and to loan the purchase money to each applicant. It was proper to cross-examine each defendant in regard to his statements as to the intent with which he acted in this matter and in regard to the reasons which he gave for so doing. In cross-examining the defendants it was proper to lay the foundation for impeaching them by showing that they committed similar cotemporaneous acts with guilty intent and as a part of the general plan, system and purpose, and with the same identical motive As a matter of course it was proper to thereafter introduce such impeaching evidence in rebuttal as tending to discredit the testimony of the defendants and to establish the falsity of their theory of defense.

In the case of *Wolfson v. United States,* 101 Federal, 434, the Circuit Court of Appeals says:

> "When a defendant is on trial for one offense, irrelevant testimony of the commission

of another offense should not be received. If, however, the evidence is relevant, if it tends to prove the commission of the offense for which the defendant is on trial, or, in cases where the intent is material, if it tends to show the intent with which the act charged was committed, the fact that the evidence shows the commission of another offense does not serve to exclude it. In Wood v. U. S., 16 Pet. 342, 360, 10 L. Ed. 987, 994, the Supreme Court, Mr. Justice Story speaking for the Court, said:

" 'Where the intent of the party is matter in issue, it has always been deemed allowable, as well in criminal as in civil cases, to introduce evidence of other acts and doings of the party of a kindred character, in order to illustrate or establish his intent or motive in the particular act directly in judgment.'

"In the case of Moore v. U. S., 150 U. S. 57, 14 Sup. Ct. 26, 37 L. Ed. 996, the defendant was indicted for the murder of Charles Palmer. The government relied mainly on circumstantial evidence. Some of this evidence tended to show that the defendant was also guilty of the murder of a man named Camp. Objection was interposed to that part of the evidence. Mr. Justice Brown, speaking for the Court in that case, said (at page 61, 150 U. S., page 28, 14 Sup. Ct., and page 998, 37 L. Ed.):

" 'The fact that the testimony also had a tendency to show that defendant had been guilty of Camp's murder would not be sufficient to exclude it, if it were otherwise competent.'

"The trial judge carefully limited the application of Moxey's evidence. The jury was instructed as to its purpose, and was informed that it was not offered, and could not be used, for the purpose of convicting the defendants

of offenses for which they were not on trial. The fact that this evidence tended to prove another crime does not, as we have seen, exclude it. The fact that a prosecution based on the acts offered in evidence would have been barred by the statute of limitations is immaterial. If the evidence was relevant, it was not affected as evidence by the lapse of three years from the occurrences."

In the case at bar the trial Court carefully limited the application of all that class of evidence by the following instructions, to wit:

"As I had occasion to admonish you during the course of the trial, however culpable you may believe the defendants or any of them may have been with reference to any offense testified to but not included in this indictment, or however well established you may deem the criminality of any of them in connection with any offense other than the one charged, you cannot find the defendants or any of them guilty unless you find, beyond a reasonable doubt, that they have committed the crime of conspiracy to suborn perjury as defined in these instructions, and as charged in the indictment. The examination into such collateral facts was allowed as tending to establish guilty intent, purpose, design or knowledge and should be so considered in such relation to the charge under which they are tried."

See Vol. 3, *Transcript of Record*, pages 1461 and 1462.

And the trial Court further instructed the jury upon the same subject as follows:

"There has also been some evidence introduced before you tending to show the acquisi-

tion of certain lands in an unlawful manner by defendant Van Gesner, which lands belong to the State of Oregon, situate near to the public lands described in the indictment in this case. This evidence is admitted as tending to show a pre-existing design, plan or scheme on the part of the defendants Van Gesner and Williamson, as bearing upon the question of motive in the doing of the particular acts charged in the indictment; and it is limited in its relevancy to the charges against Williamson and Gesner. It has no relation to the defendant Biggs, and you cannot consider it as bearing upon the question of Biggs' guilt or innocence.

"There is, too, some evidence before you in relation to the character of the land applied for by some of the applicants, that is, whether it was heavily timbered, or stony, or the like. The question of whether or not the lands applied for by the several entry men and entry women were lawfully of a character subject to entry under the timber and stone law, is not directly involved in this charge of a conspiracy to suborn. The relevancy of such evidence is the relationship it may have to the motive or intent or design of the defendants in the doing of the acts charged against them in the indictment under which they are tried."

See pp. 1463 and 1464, *Transcript of Record.*

The character of the case under consideration has necessarily to be taken into account in passing upon questions affecting admission and exclusion of evidence.

In the case at bar the evidence shows that the defendants Williamson and Gesner were in the sheep business and that they had a summer range at a

place known as the "Horse Heaven" country in Crook County, Oregon, at a distance of about twenty miles from the town of Prineville, where they resided, and where Dr. Gesner had for many years been a practicing physician. All the odd sections of the township which constituted their summer range were owned by a wagon road company and for a number of years prior to 1902 Williamson and Gesner had leased several of the odd sections of land from that wagon road company. They owned the land upon which their shearing plant was located at the summer range and did not own any other land in that vicinity. The wagon road company had uniformly refused to sell any of its lands there. In May, 1902, defendants learned that a rival sheep firm by the name of Morrow and Keenan had contracted to lease from the wagon road company practically all of the odd sections of land in the aforesaid township, and they immediately protested to the agent of the wagon road company against its leasing said lands to their rivals and insisted that they were entitled to have a lease for all of such odd sections of land themselves. The agent of the wagon road company decided, however, that he must stand by his agreement with Morrow & Keenan. Thereupon Williamson and Gesner immediately employed the County Surveyor to run the lines of the different sections of land in said township for the purpose of determining whether or not the springs and small streams of water which are located in said township were upon

the odd or even sections thereof. A rough survey demonstrated that the most valuable springs and streams were upon the even sections of land, which still belonged to the United States. The aforesaid township constituted the best summer sheep range in that part of Oregon. It was partially covered by scraggly timber, which had no market value at the time, if at all. In many places there were long stretches of splendid grazing land upon which there was not a stick of timber of any account. The defendants, Williamson and Gesner, immediately planned to secure all of the even sections of land which contained springs or running water so as to control this entire summer range. In June, 1902, they applied to the bank at Prineville for a loan of three thousand dollars and secured the same, and a few months later they applied to the bank at Dalles, Oregon, for a loan of six thousand dollars, and secured the same, and all of this money was advanced by them to the applicants in payment to the Government for their respective purchases of land. Gesner employed Biggs to attend to the matter of securing applicants for him and of filing them upon the land. Biggs was a practicing attorney and was a United States Court Commissioner at Prineville. The evidence shows, and it was admitted by the defendant Gesner, that forty-five applicants filed upon lands selected for them by him at and in the aforesaid township within a period of about two months. Biggs, Gesner, Williamson and Williamson's wife all filed upon land at the

same time with eight or nine of the other applicants. The evidence clearly shows that these lands were selected by Gesner without any regard to the amount of timber that was on them and solely for the purpose of controlling said sheep range in said township. The testimony of the various applicants shows conclusively that not one of them filed upon the land because it was valuable chiefly for its timber. On the contrary, the evidence clearly shows that very little, if any of the land, was valuable chiefly for its timber.

In the case of *United States v. Budd,* 144 U. S., p. 167, the Supreme Court, in discussing the meaning of the Timber and Stone Act, says:

> "We do not mean that the mere existence of timber on land brings it within the scope of the act. The significant word in the statute is 'chiefly'. Trees growing on a tract may be so few in number or so small in size as to be easily cleared off, or not seriously to affect its present and general fitness for cultivation. So, on the other hand, where a tract is mainly covered with a dense forest, there may be small openings scattered through it susceptible of cultivation. The chief value of the land must be its timber, and that timber must be so extensive and so dense as to render the tract as a whole, in its present state, substantially unfit for cultivation."

In the case at bar each applicant admitted that he did not examine the land upon which he filed for the purpose of determining whether or not it was as good as or better than any of the other land

in that vicinity in regard to the amount of timber growing upon it, and admitted that he filed upon that particular piece of land solely because it was the piece selected for him by the defendant Gesner.

In the case of *United States v. Budd,* at page 163, the Supreme Court said:

> "Nor is this a case in which one particular tract was the special object of desire, and in which, therefore, it might be presumed that many things would be risked in order to obtain it; for it is clear from the testimony that not the land but the timber was Montgomery's object, and any tract bearing the quality and quantity of timber (and there were many such tracts in that vicinity) satisfied his purpose. This is evident, among other things, from the testimony of one Tipperry, upon which some reliance is placed by the Government, which was that Montgomery offered him one hundred dollars, besides all his expenses, if he would take a timber claim in that vicinity (no particular tract being named) and afterwards sell to him."

In the case at bar the evidence clearly shows that Williamson and Gesner were not desirous of purchasing timber lands in a particular vicinity for the purpose of securing the timber. On the contrary, what they desired was to secure the land itself for grazing purposes. The evidence shows that there was strong rivalry between the sheep men and the cattle men for possession of that particular range, as well as between the defendants Williamson and Gesner and the firm of Morrow & Keenan. Under these circumstances "it might be

"presumed that many things would be risked in "order to obtain it". It is apparent that "one "particular tract was a special object of desire" on the part of Williamson and Gesner. They wanted these lands for a sheep range. They wanted to secure the springs and small streams which were upon these lands for the purpose of controlling the entire range within that township. They had been occupying the range for several years and had just discovered that they were about to lose control of it by reason of the fact that the wagon road company had leased the odd sections which they wanted to Morrow & Keenan.

It is difficult to imagine a case in which it would be more important to establish the motive, if any existed, by which defendants were actuated to commit the crime with which they are charged in the indictment.

In the case of *Moore v. United States,* 150 U. S., p. 60, the Court said:

> "We think it was within the discretion of the Court to admit the testimony in dispute of Kitty Young. As intimated in the case of Alexander v. United States, 138 U. S. 353, where the question relates to the tendency of certain testimony to throw light upon a particular fact, or to explain the conduct of a particular person, there is a certain discretion on the part of the trial judge which a Court of errors will not interfere with, unless it manifestly appear that the testimony has no legitimate bearing upon the question at issue, and is calculated to prejudice the accused in the

minds of the jurors. There are many circumstances connected with a trial, the pertinency of which a judge who has listened to the testimony, and observed the conduct of the parties and witnesses, is better able to estimate the value of than an Appellate Court, which is confined in its examination to the very words of the witnesses, perhaps imperfectly taken down by the reporter. It was said by Mr. Justice Clifford, in delivering the opinion of this Court in Castle v. Bullard, 23 How. 172, 187, that 'whenever the necessity arises for a resort to circumstantial evidence, either from the nature of the inquiry or the failure of direct proof, objections to testimony on the ground of irrelevancy are not favored, for the reason that the force and effect of circumstantial facts usually, and almost necessarily, depend upon their connection with each other'. And in Hendrickson v. People, 10 N. Y. 13, 31, it is said that 'considerable latitude is allowed on the question of motive. Just in proportion to the depravity of the mind would a motive be trifling and insignificant which might prompt the commission of a great crime. We can never say the motive was adequate to the offense; for human minds would differ in their ideas of adequacy, according to their own estimate of the enormity of crime, and a virtuous mind would find no motive sufficient to justify the felonious taking of human life'. See also Shailer v. Bumstead, 99 Mass. 112, 130; Commonwealth v. Coe, 115 Mass. 481, 504; Commonwealth v. Pomeroy, 117 Mass. 143; Murphy v. People, 63 N. Y. 590, 594; Kennedy v. People, 39 N. Y. 245; People v. Harris, 136 N. Y. 423; Commonwealth v. Abbott, 130 Mass. 472."

The case of *Olson v. United States,* 133 Federal, 849, decided by the Circuit Court of Appeals, Eighth

Circuit, Nov. 23, 1904, is very instructive upon the question of the admissibility of evidence tending to show intent, knowledge and motive upon the part of the defendants and of any person whose motive or intent may become material for the purpose of showing the nature of the particular transaction with which he is connected, although that particular person's intent or motive may not be one of the issues in the case. In the *Olson* case the defendants were indicted for conspiracy to defraud the United States by means of illegal entries of timber lands by different persons. A number of separate indictments were returned against the same defendants relating to the acquisition of different pieces of land at about the same time and the cases were consolidated for trial and this fact among others was assigned as error by the plaintiffs in error. The Appellate Court held that they were all the same class of crimes and offenses and might have all been joined in one indictment in separate counts thereof, and that where there are several indictments which might have been joined in one indictment they may be consolidated for one trial under Section 1024, Revised Statutes of the United States.

In discussing the meaning of the Timber and Stone Act the Court says at page 853:

> "This view of the meaning of the statute forbids sustaining the contention of counsel for plaintiff in error that there can be no violation of the act unless an enforceable agreement

was made by the applicant before his application to enter the land whereby the title should inure to the benefit of another. To hold that the provisions of the statute that the applicant shall not have in any manner, directly or indirectly, made any agreement or contract whereby the title which he may acquire shall inure to the benefit of any one except himself, contemplates an agreement or contract in writing good under the statute of frauds, would be to destroy the prohibitive conditions mentioned, and render ineffectual the object and purpose of the statute."

And at page 854 in the same case, in commenting upon the admission of evidence of similar offenses committed at or about the same time for the purpose of assigning the intent of the parties in the case on trial, the Court said:

"We see no objections to the validity of the indictments which were dismissed; but, even though they were invalid, no prejudice resulted, as all the evidence received was admissible under the indictment upon which the conviction was had. The charge was conspiracy to defraud the United States out of a large tract of land. A portion of the lands were embraced in each indictment, and in the trial of either case evidence which tended to establish other related acts of the same character, done at or about the same time, were admissible as tending to establish the motive and intent of the defendants. In Wood v. United States, 16 Pet. 342-360, 10 L. Ed. 987, it was said:

" 'Fraud, being essentially a matter of motive and intention, is often deducible only from a great variety of circumstances, no one of which is absolutely decisive, but all combined

> together may become almost irresistible as to the true nature and character of the transaction in controversy. The case of Irving v. Motley, 7 Bing. 513, turned upon this very point. There the action was trover to recover back goods which had been purchased by an agent for his principal by means of a fraud. In order to establish the plaintiff's case it became necessary to show that other purchases had been made by the same agent for the same principal, under circumstances strongly presumptive of a like character. No doubt was entertained by the Court of the admissibility of the evidence.' "

At pages 856 and 857 the Court further discusses the question of the character of evidence which is admissible for the purpose of establishing the conspiracy to defraud the Government out of the land and particularly to establish the intent of the defendants when the case is tried upon the theory advanced by them that the entries were made by the respective entrymen in good faith and not for speculation or under a prior contract or agreement to convey the same to the defendants as soon as title was acquired. The statements of the Court upon this subject are so applicable to the case at bar that we feel justified in quoting from them at length. The Court said:

> "The indictment was based and the trial had upon the theory that these entries were not made in good faith by the several entrymen for their own use, but were made for the use and benefit of one or all of the defendants. A large amount of testimony was introduced for that purpose; in other words, it was sought to establish that the various entrymen, at the time

they made their entries at the land office, did not intend the purchase to be for their own use and benefit, but as the agent or hireling of the defendants, for the use and benefit of the defendants, or some of them. We have before said that it was not necessary for the Government to establish an express agreement that the entry was made for some one other than the entryman, but that it was competent to show that the motive and intent of the party making the entry was that it was for the use and benefit of another; that the question for the jury to determine was, what was the purpose, intent and motive of the parties when they made the entry? That being so, it follows that the intent and motive of the party was the subject of inquiry; and the law we think to be that, whenever the motive, belief or intention of the person is a material fact to be proved under the issue, it is competent to prove what such motive, belief or intention was by the direct testimony of such person, whether he happens to be a party to the action or not. Berkey v. Judd, 22 Minn. 287; Garrett v. Manheimer, 24 Minn. 193; Gardom v. Woodward, 44 Kan. 758, 25 Pac. 199, 21 Am. St. Rep. 310; Frost v. Rosecrans, 66 Iowa 405, 23 N. W. 895; Bradner on Evidence, 390. The testimony of such party as to his intent and motive is not conclusive, but is competent. We do not wish to be understood as saying that, had the Government shown a specific, express agreement between the entrymen and the defendants that in consideration of a given sum they would enter the land and then convey to the defendants, such testimony would be admissible. It is unnecessary to now pass upon such a case. What we do decide is that where it is sought to show by a chain circumstances that a party in doing an act was actuated by an illegal purpose and motive, it is competent for the party

to testify directly that he had no such purpose or motive; and, also, where it is sought to show by a chain of connected acts and circumstances that an agreement existed, an agreement requiring the concurrence of minds, that it is competent for a party to such alleged agreement to testify directly that no such agreement existed.

"Defendant offered evidence to show the value of the timber upon the land in question. This was objected to as incompetent and immaterial, and the objection sustained. While it is true that, if the evidence established the existence of the conspiracy and the overt act as alleged, it would be immaterial what the value of the timber was, yet we think its value competent evidence to be considered in connection with all the other facts and circumstances as bearing upon the question whether or not the entry was made in good faith or for the use and benefit of another. We think it would have been competent for the Government to have shown, had it been a fact, that the timber upon each tract was worth, say $1,500, and that the same was sold for $500, as bearing upon the question whether the entry was made pursuant to a prior arrangement or agreement that it should be for the benefit of the purchaser. In all cases involving the fraudulent transfer of property we understand the law to be that inadequacy of consideration is a circumstance to be considered in determining the bona fides of the transaction; and it would be competent for the Government to show inadequacy of consideration as a circumstance bearing upon the good faith of the transaction, we see no reason why it was not competent for the defendant to show that full consideration was paid, as bearing upon the bona fides of the transaction. We adhere to the rule announced in Golden Reward Min. Co. v. Buxton Min. Co.,

97 Fed. 413, 38 C. C. A. 228, wherein it was announced by this Court:

" 'That testimony which does have some tendency to establish a material fact may be rejected by a trial judge, and should be rejected when its admission will have a tendency to divert the attention of the jury from the precise issues involved in the case and protract the trial beyond reasonable limits.'

"We do not think, however, that the qualification of the general rule there announced applicable to this case, as it does not appear that this question of value would have necessarily protracted the trial or had a tendency to divert the attention of the jury from the real question; and, as we think the question of value a proper circumstance to be considered in determining the good faith of the transaction, the testimony should have been admitted. There is, however, another reason why the testimony should not have been excluded. The Government gave in evidence the affidavits of the various parties, when filing papers in the land office, showing the value of the timber upon each quarter section to be from $700 to $800. True it is that this was not offered by the Government for the purpose of showing the value, yet the value thus stated was before the jury, and we cannot say that it did not have some influence when considering the other evidence in the case, in determining the good faith and bona fides of the various entries. Where the Government gives in evidence the declaration of a party upon a material matter, we think it competent for the party to show what the real fact is in respect thereof."

In the case at bar it is apparent from the evidence, as has been before stated herein, that each

entryman conspired with the defendants to defraud the Government out of the particular piece of land upon which he filed, and if the defendants herein had been tried for conspiring to defraud the Government out of all the lands filed upon by said forty-five entrymen it must be conceded that the intention of each entryman at the time he filed upon the land and at the time he made his final proof would be material and could be proven by his own testimony as well as by circumstantial evidence such as his action in disposing of the land by conveying the same immediately after receiving his final receipt had the transaction progressed to that point. It cannot be doubted that his intention could be proven by his own testimony. His testimony would not be conclusive as to the fact, but it would be highly persuasive and clearly competent. In the case at bar an express agreement between the entrymen and the defendants that in consideration of a given sum they would enter the land and then convey to the defendants was not proven, at least as to some of the entrymen, and it was claimed upon the trial by the defendants that no such express agreement was made with any one of the entrymen, and it was insisted by defendants upon the trial that all of the entries were made in good faith by the several entrymen for their own use, under an agreement to permit the defendants Williamson and Gesner to graze their sheep upon the land in lieu of paying interest upon the purchase price of the land which was to be loaned to each

entryman at the time of making his purchase from the Government. The Government relied upon a chain of circumstances to prove that the defendants in the case at bar procured each and every one of the forty-five entrymen to swear falsely in making his application and in making his final proof by swearing that he was not taking the land on speculation, but was taking it for his own exclusive use and benefit, and that he had not, either directly or indirectly, made any contract or agreement with any person whomsoever by which the title which he acquired to the land would inure to the benefit of any other person whomsoever; whereas, in truth and in fact, he was applying to purchase the land on speculation and under a prior understanding and agreement to convey the title to the defendants as soon as he acquired it from the Government. The fact that the land in many instances which was filed upon by certain entrymen contained very little timber and that such timber contained no market value was one of the circumstances relied upon as constituting a link in this chain of evidence, and the fact that the defendants, Williamson and Gesner, needed the land for grazing purposes, and that in most instances it contained springs and running water and was valuable to them for grazing purposes and was more valuable for such purposes than for its timber, was another circumstance relied upon by the prosecution. These facts tended to prove *motive* on the part of defendants in conspiring to suborn the en-

trymen to commit perjury as alleged in the indictment. They bear upon the *bona fides* of the transaction and the good faith of the entrymen as known to the defendants, because it is indisputably proven that one of the defendants selected the land to be filed upon for each of the forty-five entrymen, and the evidence strongly tends to prove that in each instance the land was selected by said defendant solely with reference to its availability and usefulness for grazing purposes and to enable him to control that summer range, and these facts also tend to prove that what the defendants Williamson and Gesner wanted was the *land* and *not the timber.*

In the *Olson* case the entrymen "were all informed by Olson that they could make $50 by "taking a piece of land under the Stone and Timber Act, but were also informed by him that "under the law they could not offer to sell it until "after they had made final proof".

Of course the prosecution was not bound by this express statement, which was indisputably established as having been made by the defendant to each entryman, and, as the court held, it was clearly competent, nevertheless, to prove that at the time each entryman filed and made his final proof he *did intend* to convey the land to Olson in consideration of a net profit of fifty dollars.

The case is on all-fours with the case at bar, as to the principle involved, to wit, the right to prove

that the object and purpose of the conspiracy, as accomplished and consummated, was a fact or circumstance tending to prove a link in the chain of circumstantial evidence that the conspiracy had been entered into. If it is competent to prove that the Government was actually defrauded of the land, under an indictment charging the defendants with conspiracy to defraud the Government out of the land, it would logically follow that it is competent to prove that perjury was actually committed by certain parties under an indictment charging the defendants with conspiring to suborn those persons to commit perjury.

In Volume 3, at page 1144 of the Record, Campbell Duncan, one of the entrymen, testified as follows:

"Q. What did Gesner say:

"A. Why, he said that he would loan us, I think " it was $450 or $475 when we proved up and gave " him a mortgage on the land, for thirty or sixty " or ninety days, something like that. When we " were ready to turn it over, he would pay the " balance; the remainder of the $500 for the deed."

And commencing at the bottom of page 1148, the witness, in testifying about his signing and swearing to his original application papers before the defendant Biggs as U. S. Commissioner, testified as follows:

"Q. Do you remember as to whether anything " special was said about that, and as to your right

" to have any agreement or understanding with Dr.
" Gesner or any one else as to what was to be-
" come of the land after you got title? Do you
" remember whether Mr. Biggs said anything about
" that at the time?

"A. Who was to get the land?

"Q. Yes, or what right you might have?

"A. He said we could have an understanding.
" We could not make any contract.

"Q. What did you understand by contract?

"(Objected to as immaterial and incompetent. Ob-
" jection overruled. Defendants except.)

"A. I thought that it had to be drawed up in
" writing.

"Q. Now, at the time that you signed this, what
" was your intention as to what you were going
" to do with the land when you got title?

" Mr. BENNETT: That all goes in subject to our
" objection, I suppose, your Honor?

"A. I intended to let them have it.

"Q. (COURT): Intended what?

"A. To let Gesner have the land.

"Q. To let him have it for what considera-
" tion?

"A. For the remainder of the $500, that would
" be about $75.

"Q. Who was to furnish the final proof money?

"A. Gesner.

"Q. Now, who attended to the publication of
"the notice, do you know, and payment to the news-
" papers?

"A. They did.

"Q. You didn't do anything about it?

"A. No.

"Q. After signing these papers, did you take " them with you, or what did you do with them?

"A. No.

"Q. What did you do with them? Leave them " there with Biggs?

"A. I think so."

The witness then proceeded to testify that both he and his wife relinquished their filings, without making final proof on the land, and that they did this at the suggestion of Gesner and Williamson, just before the time arrived for making final proof. The witness was working at a livery stable in Prineville, and Gesner went to the stable and took the witness to his office, where Williamson was seated, and told the witness that he could not let him have the money to prove up, and that Dr. Gesner picked up the "Oregonian", and handed it to the witness and told him to read a certain article that was in it. The article appears at pages 1155 to 1157 of the Record, and reads as follows:

"HITS THE SHARKS.

SECRETARY HITCHCOCK ON PUBLIC LANDS.

POINTS TO OREGON CASES.

Urges Early Appeal of the Timber and Stone Act, and Penalty for Law Violators.

Bold Words on the Evil of Fencing the Public Domains by Private Interests—New Irrigation Law, Forest Reserves.

"Oregonian News Bureau, Washington, D. C., Nov. 23.—The recently discovered timber frauds in Oregon are rather widely exploited in the annual report of Secretary Hitchcock of the Interior Department, and held up as a forceful argument for the immediate revisions of the Timber Laws. Although the Secretary cites facts and figures heretofore published in the 'Oregonian', he is gracious enough to omit from his official report the name of the State in which these frauds were discovered. His comments, nevertheless, are so pointed and so explicit that they cannot be mistaken. After showing the phenomenal increase in entries in Oregon under the Timber and Stone Act, in the last quarter, over those of the preceding three months, the Secretary says: 'Should this rate of entry continue during the entire year in that State, it would mean the acquisition, in round numbers, of 600,000 acres of timber lands under the Timber and Stone Act, and if the same activity in that class of entries were extended to the other public land States, then before the expiration of two years practically every acre of unappropriated public timbered lands would have been absorbed, and the successful operation of the Reclamation Act of June 17th last rendered doubtful, if its failure be not absolutely as-

sured, for the reservation of public timbered lands that must of necessity be made to assist in conserving the waters to be impounded by the irrigation systems to be established under that act will be defeated or made so expensive by the purchase of said lands from private owners as to greatly delay the completion of the irrigation systems contemplated by that act.

"The reports of the special agents of this department in the field show that, as some of the local land offices, carloads of entrymen arrive at a time, every one of whom makes entry under the Timber and Stone Act. The cost of 160 acres of land under that Act and the accompanying commissions is $415. As many as five members of a family who, it can be readily shown, never had $2075 in their lives, walk up cheerfully and pay the price of the land and the commissions. Under such circumstances, there is only one conclusion to be drawn, and that is, where a whole carload of people make entry under that Act, the unanimity of sentiment and the cash to exploit it must have originated in some other source than themselves.

"*Punishment for Violators of the Law.*

"In all such cases a rigid inquiry will be instituted, to determine the *bona fides* of the entry, and if it be ascertained that the entry was not made in good faith, but in the interest of some person or persons other than the entrymen, the entry will be promptly canceled and the proper criminal proceedings instituted against the entrymen."

The witness testified as follows, as to what occurred after he read the article:

"Q. What was said after the paper was hand-
" ed to you to read and you read it, by either Wil-
" liamson or Gesner?

"A. Gesner said that I better go and relinquish; " that Hitchcock was mad." (See Transcript of Record, page 1154.)

At page 1157 to 1159 of the Record, the witness testified as follows:

"Q. Now, when you went to Biggs' office to " sign that relinquishment, what was said by Biggs, " if anything?

"A. Well, when I told him what I came for, " he drew up them papers. I don't remember that " he said anything in regard to it.

"Q. What, if anything, was said about filing " fees? Had you paid your own filing fees, or who " had paid them?

"A. I had given my note for the money.

"Q. At the time you filed, you gave a note for " the filing fees, did you?

"A. Yes, sir.

"Q. And for the publication notice?

"A. Yes, sir.

"Q. How much did you give the note for?

"A. I think it was $19.00. I and my wife.

"Q. That was for you and your wife. At the " time of filing, what was said about the giving of " that note? What was the conversation in relation " to it?

"A. Why, I spoke to Gesner in regard to letting " me have the money to file. I had the money, " but I had use for it; he said he couldn't let me " have it, couldn't, or something that way, and

" walked away. But later on, he came back and " said that Biggs would fix that up when I went " up there to his office, and he drew up the note " when I went up there.

"Q. Where were you working at that time?

"A. For William Adams.

"Q. On the farm?

"A. Yes, sir.

"Q. What wages?

"A. $35 a month.

"Q. Had you saved up any money? Were you " ahead any?

"Mr. BENNETT: That is all objected to as im- " material and incompetent.

"COURT: I think it is competent to show whether " he had any money.

"A. I didn't have very much.

"Q. What do you call much? How much did " you have?

"A. $15 or $20.

"Q. Now, then, at the time that you relinquished, " what was said about the note, if anything? Or " what was done about it?

"A. Well, after I relinquished, why Biggs had " overlooked it, and then I called his attention to " that note, and he handed it to me."

The foregoing article from the "Oregonian", of date November 24th, purporting to be a telegram from Washington, D. C., dated November 23rd, and entitled "Hits the Sharks", was also shown to the

entrymen, Wilford J. Crain and George Gaylord, immediately after they had relinquished their filings, in accordance with a request sent to them by Gesner. The defendant Williamson was present in Gesner's office when Crain and Gaylord arrived there from Biggs' office immediately after relinquishing. The testimony of Crain as to what occurred at that time appears at pages 398 and 399 of Volume 1, Transcript of Record, and reads as follows:

"Q. Who else was there when you went before " Biggs to relinquish?

"A. George Gaylord.

"Q. Now, where did you go from Biggs' office?

"A. Why, I think I went down town a little bit, " and then to Dr. Gesner's office.

"Q. Did anybody go with you to Gesner's of- " fice?

"A. Yes, sir.

"Q. Who?

"A. George Gaylord.

"Q. Now, who was in Gesner's office when you " got there?

"A. Mr. Williamson and Dr. Gesner.

"Q. What, if anything, was said while you were " there? State all that was said that you can re- " member.

"A. I don't remember much about what was " said. Gesner wrote me out a check for the

" money what I was out for the fees for me and " my wife.

"Q. Did you say anything to him about it be- " fore he wrote it?

"A. I don't remember now whether I did or " not.

"Q. I believe it was $19.50?

"Q. Do you remember how it was signed?

"A. No, sir; I do not.

"Q. What did you do with it after you got it?

"A. Put it in my pocket.

"Q. Well, what did you do with it after that?

"A. Why, I cashed it. I don't know when it " was, whether it was the same day or not.

"Q. You went to the bank yourself, did you?

"A. Yes, sir.

"Q. On the Prineville bank?

"A. I think I did.

"Q. Did you see Gaylord get one?

"A. Yes, sir.

"Q. At the same time?

"A. Yes.

"Q. Was Williamson present when you received " it?

"A. Yes, sir.

"Q. Well, Mr. Williamson said that he didn't " think it would be hardly safe to go ahead and " try to make final proof on the claims now; that " there was—I believe he said Hitchcock was making " a little kick about timber frauds, or something in

" regard to that. He went ahead and read a little " sketch in the paper to us, in the "Oregonian", I " believe it was, in regard to that. I don't remem- " ber just how it read now.

"Q. Anything said about taking up a claim " later?

"A. Yes. He said he thought later on we " could go ahead and file again and go ahead and " prove up on the claims."

Tr. of Record, Vol. I, pages 398, 399.

The entryman and witness George M. Gaylord testified in regard to said "Oregonian" newspaper article, and his own action in relinquishing his filing is as follows:

"Q. Well, if there was any talk with Gesner, " is what I am getting at. Did you have any talk " with Gesner before proving up or before the time " came for final proof?

"A. No, not before I went to prove up.

"Q. When you went to prove up did you have " any talk with Gesner?

"A. I talked with him that day, yes, sir.

"Q. Did you talk with Biggs first?

"A. Yes.

"Q. What talk did you have with Biggs?

"A. He said he had decided not to let any more " prove up.

"Q. Tell all you remember of that conversation?

"A. And if we would go to Mr. Gesner he would " pay us back our filing fee.

"Q. What did you say to him?

"A. I told him I would go and see Mr. Gesner, " and I did.

"Q. Did you say anything about proving up " to Biggs? Did you say anything to Biggs as " to what your wish was in the matter of proving " up?

"A. Not that I remember of.

"Q. Do you remember of his giving you any " other reasons than that you have stated? Did " he say anything about why Gesner was—

"A. I believe he said there was a disturbance " about this land business, and they had decided " not to prove up any more claims until it passed " over.

"Q. You say you went to see Gesner? Where " did you find Gesner?

"A. I found him in his office.

"Q. Was there anybody else there?

"A. Wilford Crain and Mr. Williamson.

"Q. Was Wilford Crain with you when you were " in Biggs' office?

"A. Yes, sir.

"Q. Now, in Gesner's office, who else was there " beside Crain and Gesner?

"A. Mr. Williamson.

"Q. What talk took place there?

"A. Well, we talked with Mr. Gesner about " proving up on the land and he said he was sorry " that we couldn't go ahead, but he thought that

" after this scare was over we would be able to go " ahead and prove up on the land. And Mr. Wil- " liamson was reading the 'Oregonian', and he read " a little sketch out of it where Mr. Hitchcock was " raising a kind of an excitement over this land " business.

"Q. Can you remember the substance of any " that he read?

"A. No, I don't.

"Q. Do you remember anything else that was " said there?

"A. No, I don't recall anything else to mind " now.

"Q. Do you remember anything being said about " it not being safe to go ahead then?

"(Objected to as leading. Objection overruled. " Defendants except.)

"A. Why, I don't remember whether that was " all there in Gesner's office, or whether it was " spoken of in Biggs' office.

"Q. Was it spoken of in one place or the other?

"(Same objection. Same ruling. " Same exception.)

"A. That is my impression that it was, but I " would not say positively.

"Q. Did you get the money back for your filing " fees?

"A. Yes, sir.

"Q. Who gave it to you?

"A. Mr. Gesner gave me a check for it on the " Prineville Bank.

"Q. Did Crain get his?

"A. Yes.

"Q. Did you see him get it?

"A. Yes, sir.

"Q. How did he get his?

"A. He got that by check the same as I did.

"Q. Was it right there in the office?

"A. Yes, sir.

"Q. Was Williamson present?

"A. Yes, sir.

"Q. How were the checks signed?

"A. I think by Williamson and Gesner.

"Q. Was it on a Prineville bank?

"A. Yes.

"Q. Did you cash it?

"A. I did.

"Q. The same day?

"A. Yes.

"Q. Did you see Crain cash his?

"A. No, I did not see him cash his.

"Q. On that day did you relinquish before or " after the talk with Gesner?

"A. Afterwards.

"Q. Is that your signature?

"A. Yes, sir.

"Q. Did you have any further talk with Biggs " when you went back to relinquish?

"A. Not that I remember of."

Tr. of Record, Vol. III pp. 1370, 1371, 1372, 1373.

The foregoing evidence has been quoted for the purpose of giving this court a knowledge of the character of the evidence of the entrymen, without the necessity of reading three volumes of Transcript of Record.

Another significant circumstance which is to be noted, and which is indisputably proven by the evidence, is, that at the time these filings were being made there was another U. S. Court Commissioner living in Prineville, who had power and authority to accept filings and final proof from timber entrymen, and that there was, likewise, a clerk of a court there who had the same power, but that all entrymen were sent by Gesner to Biggs, and that all of the entrymen made their applications and their final proofs before Buggs, with the exception of one or two, who appeared at Biggs' office for the purpose of making final proof at the time specified in their notices, on a certain day, and who were then and there examined upon their final proofs by a man named Boggs, who was a clerk and office-associate of Biggs, and who stated that Biggs was out of town. After the final proofs were signed by the entrymen, Boggs accompanied the entrymen to the County Clerk's office, and there the Deputy County Clerk swore them and affixed his jurat.

POINT VII.

The only other assignments of error which counsel for plaintiffs in error have argued in their brief are those relating to the testimony of the witnesses Perry and Swearingen.

This testimony was clearly competent, for the purpose of establishing knowledge, intent, motive and pre-existing design, system and scheme, and it was strictly limited to that purpose by the court at the time it was admitted. The court also instructed the jury very particularly and carefully in regard to it. The attempt of Gesner to induce Perry to file upon school land was made at the very time that the fraudulent timber entries were made at Gesner's request, to wit: in June, 1902. The particular land upon which Gesner requested Perry to file was located in the center of the same township in which the timber claims were located, and the school land was so located that it was almost invaluable to the perfection of the plan of the defendants for securing the ownership and control of that sheep range. The school land which was filed upon by Mrs. Swearingen was the same which Perry was requested to file upon, or joined it.

The theory upon which the testimony was permitted to be introduced will be seen by reading the cross-examination of the defendant, J. N. Wil-

liamson, at pages 1091 to 1094, of Volume III, Transcript of Record. It reads as follows:

"Q. Then, Mr. Williamson, on June 24 I call " your attention to the entry on the debit side of " Williamson, Wakefield & Gesner's account of " the First National Bank of Prineville, Oregon, " and entry of June 24, 1902, $200; and I call your " attention to a certified copy of a letter by J. J. " Smith, County Clerk at Prineville, to M. L. " Chamberlain, Clerk of the State Land Board, " inclosing an application to purchase State Land " of Mary A. Swearingen, and a draft of $200 in " full payment for the same. Now, with these two " things to refresh your memory, didn't you have " a talk with Dr. Gesner prior to June 24 and in " June, while you were up there on that trip, in " which it was agreed that he could use the firm " money and secure somebody to apply for sec- " tion 16, township 15-19, from the State for school " lands and pay a consideration to the person for " filing upon it?

"Mr. Bennett: Now, your Honor, we object to " that as immaterial and irrelevant, and not proper " cross-examination except of a defendant on the " witness-stand and as being, if admissible at all, " a part of the Government's direct case.

"The Court: I will overrule that I think it " is competent as bearing upon the question of " knowledge and pre-existing design, system, or " scheme. The jury will understand, though, and

" it is proper at this time to admonish them, the " rule of law is that no matter how guilty a man " might be proven on an offense not the one under " investigation, he could not be convicted except " of the one under investigation. Its only rel- " evancy is as bearing or tending to bear upon the " question of knowledge, intent or pre-existing de- " sign or scheme.

"Mr. BENNETT: And we except to your Honor's " statement to the jury in which there seems to be " an application that these papers and this exam- " ination show or tend to show that the defendant " is guilty of some other crime.

"The COURT: Well, Judge, I don't mean that. " I desire the jury to understand—I mean to carry " no intimation of any kind, character or descrip- " tion. I am passing upon the legal admissibility " of the testimony. I am doing it in order that " the rights of the defendant may be guarded " under the rules of law.

"Q. Now you may answer the question.

"A. I don't remember anything about that trans- " action in general. There might have been some- " thing said about it, but I don't recall it.

"Q. I call your attention to a certified copy of " a letter from Dr. Gesner to M L. Chamberlain, " Salem, Oregon, of date June 23, 1902, inclosing " a check for $80 for payment on the west half " of section —

"Mr. BENNETT: We object to the reading of these " statements.

"Mr. HENEY: Well, I will let you read that letter. " (Hands letter to witness.)

"A. I never saw the letter before.

"Q. Do you remember having any conversation " with Dr. Gesner in June, 1902, in relation to his " having his sister, Mrs. S. M. Jerowe, take up a " portion of that section 16 in township 15-19 for " the firm?

"Mr. BENNETT: This matter all goes in sub- " ject to our objection, without interposing it every " time.

"COURT: I understand all this examination under " this ruling goes in against your objection for " reasons already stated, and the objection is over- " ruled and exception goes to the admission.

"A. I don't remember anything of the kind " having occurred when we were there in June, " when I was there in June."

Tr. of Record, Vol. III, pp. 1091-1094.

Plaintiffs in error complain that the prosecution was permitted to impeach the testimony of the witness Branton upon an immaterial matter. The testimony of Branton was indeed important to the defendants, and it bore every earmark of being perjury. The particular in which it is claimed that the impeachment was on an immaterial matter relates to a statement that he was on his way to

Idaho, at the time he heard Gesner talking to the parties who were then being induced to file upon timber claims. Branton was passing through the country at the time, and had camped one or two days near the ranch of the man named Adams for whom the witness and entryman Campbell Duncan was working at the time. This occurred more than three years before the time of the trial. Branton had not remained in that part of the country, and had only returned there once, to wit: about one year after the filings had been made. Branton went to the timber with Duncan, with the view of taking up a timber claim, if there was sufficient profit in it. After looking over the ground he evidently concluded that the land was not worth much for the timber which was upon it, and unless he was sure that he could sell the land to Gesner and Williamson it was useless to file upon it, even though Gesner furnished the money with which to make final proof. It was natural for him to endeavor to get Gesner to commit himself absolutely to the purchase of the land, because he, Branton, did not know Gesner, and did not live in that section of the country, and had no confidence in Gesner's suggestion that he would purchase the land at a certain price, but could not and would not agree in writing to do so. Branton refused to file because he concluded that there was not sufficient profit in the transaction to pay him for remaining in that vicinity during the period of time

which would be required to publish his notice of intention to make final proof. The profit of $75 would not amount to much after he had paid his living expenses, doing nothing during that period.

No possible harm could have been done by permitting Campbell Duncan to testify in answer to the impeaching question as to whether Branton had not stated that he was on his way to Idaho, because Campbell Duncan had already testified to that fact under cross-examination when the prosecution was presenting its main case. (See Tr. of Record, Vol. III, page 1173.)

Moreover, it was material, under the circumstances, to determine the express intention and purpose of Branton at the time he was camping those few days at the ranch where Campbell Duncan was at work, because his testimony given three years later as to a statement made by Gesner at that time upon which Branton had refused to act at the time must be weighed in the light of the circumstances surrounding the parties at the time. If Branton had remained in that vicinity, or had expected to remain there, he would be much more apt to remember accurately what Gesner had said. Moreover, it was proper to test the memory of the witness in regard to what was said by himself and others, at that time, and it was clearly competent to prove that he was at least mistaken as

to what he himself had stated, in regard to his intentions and his point of destination at the time.

Respectfully submitted,

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IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

VAN GESNER, *Plaintiff in Error,* *vs.* UNITED STATES OF AMERICA, *Defendant in Error,*	No. 1369
MARION R. BIGGS, *Plaintiff in Error,* *vs.* UNITED STATES OF AMERICA, *Defendant in Error.*	No. 1370

PETITION FOR REHEARING ON BEHALF OF THE ABOVE NAMED PLAINTIFFS IN ERROR, VAN GESNER AND MARION R. BIGGS.

FRANCIS J. HENEY, Special Assistant to the Attorney General,
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Attorneys for Plaintiffs in Error.

Filed this.....day of March, A. D. 1907.
FRANK R. MONCKTON, Clerk.

By.....Deputy Clerk.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

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PETITION FOR REHEARING ON BEHALF OF THE ABOVE NAMED PLAINTIFFS IN ERROR, VAN GESNER AND MARION R. BIGGS.

The said plaintiffs in error, Van Gesner and Marion R. Biggs, hereby petition the Court for a rehearing of their respective cases, and upon the following grounds:

The importance of the determination of this case to the plaintiffs in error, and the greater importance that this Court shall not err in its administration of the law, makes it our duty

to the Court and to our clients to call attention to what appears to be manifest error in the decision affirming the judgment of the lower court in this case. Necessity for brevity and clearness impels us to present our views with a directness of statement, which would not otherwise be necessary or preferable.

Preliminarily, permit us to say that we cannot avoid the conclusion that the arguments advanced by plaintiffs in error in our reply brief were ignored. Possibly this may have been due to an oversight or omission of the Clerk in distributing the reply briefs; these briefs were filed within the time fixed by the Court's order, and should have been in the hands of the Judges several days before the opinion was prepared.

THE COURT ERRED IN ITS DECISION IN HOLDING THAT A *STATUTE* PROVIDED FOR THE PROOF OF ALL MATTERS AT THE TIME OF FINAL PROOF CONCERNING WHICH IT IS CLAIMED PERJURY WAS COMMITTED. It is stated in the opinion:

> "It is perfectly plain from the provisions of the statute, and the rules and regulations of the Land Department, that in order for any person to effect a purchase of any land under the act in question, he must first make an application to purchase by a verified written statement, which statement is an affidavit as to the truth of the matters therein declared, and, after a compliance with the prescribed procedure, must satisfy the Register of the local Land Office by deposition, in which he and such witnesses as he may produce are examined and cross-examined under oath of the truth of the matters *required by the statute* to be shown as a prerequisite to the authorized purchase. And it is just as plain that intentional false swearing by the applicant in either instance, in respect to any of the material matters *so required to be declared and sworn to*, constitute the crime of perjury, which crime is defined not by any rule or regu-

lation of the Land Department, but by a statute of the United States."

If at the time of final proof the applicant was examined and cross-examined "of the truth of the matters required by the statute to be shown as a prerequisite to the authorized purchase," and nothing further, then there would be some foundation for the decision.

But, as a matter of fact, the regulation provides that there shall be proved at the time of final proof as prerequisite to the purchase matters that are not required by statute to be proved *at all.*

Note question 13, page 304, Transcript of Record, final proof testimony of John F. Watkins: "Have you sold or transferred your claim to this land *since* making your sworn statement?" etc.

It was conceded at the trial that there was no statute providing for proof of the fact that no sale had been made *after the making of the sworn statement,* but it was contended that the regulation made in that behalf had the force and effect of law, and that one who swore falsely concerning that matter was guilty of perjury, and that those who conspired to have him so swear were guilty of conspiracy to suborn perjury. See instructions on pages 1450 and 1451, Transcript of Record.

In the Eaton case there was a statute providing a penalty for the failure to do a thing *required by law;* an omission on the part of Eaton to do a thing required by a regulation properly made, and the decision was that a *regulation* requiring a thing to be done was not a *law* requiring a thing to be done.

No man can be guilty of perjury under section 5392 unless he takes a false oath to a material matter in a case where a *law of the United States* authorizes the administration of an oath.

The section reads as follows, in so far as it pertains to this matter: "Section 5392. Every person who, having taken an oath before a competent tribunal, officer or person, in any case *in which a law of the United States authorizes an oath to be administered, etc.*"

The amendment proposed by Secretary Hitchcock and Commissioner Richards, adding to the section so that it should be perjury if one swore falsely where a regualtion of a head of a department properly made authorized the administration of an oath, has never been adopted.

It is true that section 5392 defines perjury, but it so defines it that a *law* of the United States must authorize the administration of the oath or else it is no perjury, and the Eaton case and the others cited by us show to a demonstration that the regulation under discussion is not such a law.

The particular error to which we are now striving to call the attention of the Court is this: The opininon assumes that the *statute* requires that there shall be proved *at some time* as a prequisite to the right of purchase all of the things which the regulation provides shall be established at the time of final proof, and that this is an utterly mistaken idea a careful reading of the statute will disclose, because as we have seen, the statute nowhere provides that the applicant shall prove *at all* that he has not transferred his claim to the land *since making his sworn statement.*

AS FURTHER GROUND FOR REHEARING WE MOST RESPECTFULLY URGE THAT THIS COURT IS UTTERLY MISTAKEN IN ITS CONSTRUCTION OF THE MEANING OF THE INDICTMENT IN THAT PORTION OF THE OPINION WHEREIN IT IS SAID "IT IS CONTENDED, ON BEHALF OF THE PLAINTIFFS IN ERROR, THAT THE CONSPIRACY, ACCORDING TO THE AVERMENTS OF THE INDICTMENT, 'CONTEMPLATED THAT SUBORNATION OF PERJURY SHOULD TAKE PLACE ONLY WHEN LANDS SUBJECT TO ENTRY UNDER THE TIMBER AND STONE ACTS WERE BEING APPLIED FOR,' AND THEREFORE THAT EVIDENCE TENDING TO SHOW THAT THE LANDS APPLIED FOR BY THE INSTIGATED PARTIES WERE NOT OF THE CHARACTER EMBRACED BY THOSE ACTS WAS INCOMPETENT. THIS OBJECTION PROCEEDS UPON AN ERRONEOUS VIEW OF THE INDICTMENT WHICH DOES NOT CHARGE THAT THE CONSPIRACY ALLEGED CONTEMPLATED THAT THE SUBORNATION OF PERJURY SHOULD TAKE PLACE ONLY WHEN LANDS SUBJECT TO ENTRY UNDER THE TIMBER AND STONE ACTS WERE BEING APPLIED FOR, *BUT THAT THE INSTIGATED PARTIES WOULD SO SWEAR;* WHICH IS AN ENTIRELY DIFFERENT THING, AND QUITE IN LINE WITH THE ALLEGED FRAUDULENT SCHEME."

The indictment alleges as to the particular portion so construed by this Court that the defendants conspired to suborn, instigate and procure certain persons "to state and subscribe, under their oaths, that certain public lands of the said United

States, lying in Crook County, in said District of Oregon, open to entry and purchase under the acts of Congress, approved June 3, 1878, and August 4, 1892, and known as timber and stone lands, which those persons would then be applying to enter and purchase in the manner provided by law, were not being purchased by them on speculation, but were being purchased in good faith to be appropriated to the own exclusive use and benefit of those persons respectfully, and that they had not directly or indirectly made any agreement," etc.—Transcript Record, page 10.

The questions to be discussed here are: *What does this indictment mean?* And second, if it is capable of the meaning now placed upon it, *is not the defendant in error estopped from so contending, having placed a different construction upon the indictment during three trials in the court below, and the first suggestion of the present construction being the opinion rendered in this Court.*

We ask the careful consideration of the Court on this question, *as this is the first opportunity we have had to be heard concerning it.*

While the two questions herein involved are separate, yet a discussion of the one involves such a reference to the other that we shall discuss them together to a large extent, bearing in mind that if it should be held that the Government is not estopped, such fact does not determine the true meaning of the indictment.

This indictment is not an instrument which will ever be incorporated into a book of forms as a model; but, while its meaning is not obvious as to all matters, it can be determined what it means in the particular under discussion.

First, the indictment states in general terms that plaintiffs in error, with other persons, conspired to commit an offense against the United States. Then follows the sentence "That is to say," and after it comes a description more specific as to what the offense so to be committed was, and from what follows *that is to say*, until we reach the second *that is to say* we gather that the offense to be committed was perjury; that it was to be committed in the said district (referring to the District of Oregon); that the perjury was to be committed before a competent officer in cases in which a law of the United States authorizes an administration of an oath; that the testimony would be in writing, and the persons to be instigated would declare that certain declarations and depositions by them to be subscribed were true, and contrary to such oaths subscribe material matters which they should not believe to be true.

Then follows the second *that is to say*.

And it may be noted that after each *that is to say* the pleader particularizes and states more in detail that which has gone before. After the second *that is to say* it is set out more in detail the matter concerening which oaths were to be taken; the indictment describes the land concerning which the false oaths were to be taken, giving quite fully their character and their location; says they were known as timber and stone lands; describes the proceedings in which the alleged perjury was to be committed, and states when the perjury was to be committed.

From that portion of the indictment that follows the second *that is to say* we learn that the perjury was to be committed concerning lands; that they were lands of the United States; that as a matter of fact such lands lay in Crook County and in the

said District of Oregon (notice the use of the word "said" before the words "United States" and "District," not indicating in any manner that the parties to be instigated would use any such word in an oath, or that they would in any way use the expression "said District of Oregon"); that as a matter of fact such lands were open to entry and purchase under the acts of Congress of June 3, 1878, and August 4, 1892; that as a matter of fact the lands to which the alleged perjuries were to relate were known as timber and stone lands, and that as a matter of fact the persons to be instigated would be applying to enter and purchase such lands in the manner provided by law at the time when the alleged perjury would be committed, thus describing the lands as public lands, their location, that they were subject to entry under certain acts, that they were known as timber and stone lands, and the time when and the proceedings in which the alleged perjury was to be committed.

All this precedes the verb *were*, to be found in line 4, page 11, Transcript of Record.

Now, we come to that portion of the indictment showing what the persons to be instigated would swear to, and it is, in substance, that the persons would swear that they *were* not purchasing on speculation, but in good faith; that they had made no contracts, etc., when in fact they had made contracts and were purchasing on speculation.

On page 12 of the Transcript is to be found a portion of the indictment which settles conclusively the question now under discussion. It is charged as follows:

> *"The matters so to be stated, subscribed and sworn to by the said persons being material matters under the circum-*

stances, and matters which the said persons to be suborned instigated and procured, and the said John Newton Williamson, Van Gesner and Marion R. Biggs *would not believe to be true."*

What are the matters that the persons to be instigated and the plaintiffs in error would not believe to be true? Answer: The matters to be stated, subscribed and sworn to by the persons to be instigated. That, under our construction of the indictment, means that they would not believe to be true the statement that they had made no contract; that they were not purchasing on speculation. (It is to be observed here that the only things that the plaintiffs in error had conspired to have sworn to are the facts set out in the indictment, which do not include all of the matters set out in the sworn statement.) All matters and things which the plaintiffs in error instigated persons to swear to, according to the indictment, were matters which the plaintiffs in error and the persons to be instigated would not believe to be true. If we carry out the construction of the indictment placed upon it by this Court, it follows that the persons to be instigated would swear that the lands to which the conspiracy related *were public lands, but they would not believe that to be true; that they lay in Crook County, but they would not believe that to be true; that they were in said District of Oregon, but they would not believe that to be true;* that persons to be instigated would swear that the lands were open to entry under certain acts; that they would not believe that to be true; that the persons to be instigated would swear that they were then applying to purchase public land in the manner provided by law; that they would not believe that to be true. It is perfectly obvious that the expression "lying in Crook County in said District of Oregon" is in the same construction as the phrase "open to

entry and purchase under the acts of Congress," etc., and no construction can be placed upon this indictment of such a nature as to hold that the indictment charged that the instigated persons were to swear that the lands were open to entry and purchase, but were not in fact so, that would not include the construction that they would swear that they were lying in Crook County, Oregon, when they did not in fact so lie. The expression "and known as timber and stone lands" is just as plainly a statement of fact, and not a statement of what the instigated persons would swear to as a thing could be. Also the words "which those persons would then be applying to enter and purchase, in the manner provided by law," are a statement of fact, and in their relation to the other sentences of the indictment show with clearness that there was no intention on the part of the pleader to charge that the persons to be instigated would swear to this, but that it was true as a fact.

Further, in page 12 of the Transcript:

> "When in truth and in fact, as each of the said persons would then well know, and as the said John Newton Williamson, Van Gesner and Marion R. Biggs would then well know such persons would be applying to purchase such lands on speculation, and not in good faith to appropriate such lands to their own exclusive use and benefit."

Notice the use of the words "such lands," plainly referring to the lands described above. We might as well contend that the indictment charged that the persons to be instigated would swear to the last above quoted sentences of the indictment, and that it was not intended to charge that as a fact, as the government can contend that it is not stated as a fact in this indictment that the lands were open to entry and purchase under the

acts mentioned, and were more valuable for timber than for grazing.

Don't overlook the fact that under the construction of the indictment given by this Court, the instigated persons were to swear that the land was public land; that it was open to entry, etc., and that they would not believe any of these things to be true.

If the pleader had intended to say that the persons to be instigated would swear to these various matters, he would have charged that the persons to be instigated would state and subscribe on their oath that certain lands were public lands; that they were situated in Crook County; that they were open to entry and purchase under the acts of Congress referred to; that they were known as timber and stone lands; that they would swear that they would be applying to enter and purchase the lands in the manner provided by law at the time when they were to take false oaths. He has not done so. It is said that certainty to a common intent in an indictment of this sort is all that is necessary, but under that rule of construction the meaning of the indictment must be obvious. If it is not, it is bad.

The obvious meaning of this indictment is that it charges, as a matter of fact, that the lands to which the conspiracy related were public lands of the United States lying in Crook County, in said District of Oregon; that they were open to entry and purchase under the acts of Congress approved June 3, 1878, and August 4, 1892, and known as timber and stone lands, and that when the alleged false oaths were to be taken the persons to be instigated would be applying to enter and purchase such land in

the manner provided by law. All this is stated as a matter of fact.

There is nothing in the indictment to negative this idea, and the positive statements therein confirm it.

As remarked in the opinion, it is clear from the statute that it is only lands that are chiefly valuable for the timber on them that are authorized to be purchased under acts in reference to timber lands; hence, when it is said in an indictment that the lands, concerning which false oaths are to be taken, are subject to entry under such acts, it is equivalent to saying that they are more valuable for timber than grazing.

Ever since the indictment was filed in this case the government has admitted that the indictment stated, in effect, that the land to which the conspiracy related was more valuable for its timber than grazing.

This indictment was attacked by demurrer, and, among other reasons, because, as the demurrer alleged, the indictment did not "describe or identify the perjury which is alleged to have been suborned or the land as to which such perjury was to be committed." Transcript of Record, pages 30-40.

The defendant in error filed a typewritten brief, saying, among other things, that "it is sufficient to say that the tracts of land are in Crook County, Oregon." In support of this proposition United States vs. Dealy (152 U. S., 539) was cited.

It was not contended by plaintiffs in error that the words following "certain public lands of the said United States" did not describe the kind of land that such persons would be applying to enter, but that such description was not sufficient. The Court held this description sufficient.

If the words "lying in Crook County, Oregon," are matters of description, and indicate as a matter of fact where the land was situated to which the conspiracy related, it is manifest that the words "open to entry and purchase," etc., are matters of description, as they are in absolutely the same construction and describe the kind of land concerning which the alleged false oaths were to be taken.

The testimony tending to show that the land to which the conspiracy related was void of timber *was rejected at the first two trials because the indictment in effect alleged that the land was more valuable for its timber than for grazing;* and at the third trial when this evidence was offered the plaintiffs in error objected to its admission on the ground, among other things, "that the defendants are not charged with suborning perjury in the matter as to the quality of the land, or the timber upon the land, and upon the ground that the indictment alleges that the land is *chiefly valuable for its timber,* and that the government is estopped from claiming otherwise upon the trial. Transcript of Record, 680-681. This objection was overruled, but it was not contended that the construction placed upon the indictment by the plaintiffs in error was wrong, and it never was so contended in the lower court. The Judge, in charging the jury at the last trial (pages 1463-1464, Transcript of Record), said:

> "There is, too, some evidence before you in relation to the character of the land applied for by some of the applicants—that is, whether it was heavily timbered, or stony, or the like. The question of whether or not the lands applied for by the several entry men and entry women were *lawfully of a character subject to entry under the timber and stone law is not directly involved in this charge of a conspiracy to suborn.* The relevancy of such eevidence is

the relationship it may have to the motive or intent or design of the defendants in the doing of the act charged against them in the indictment under which they are tried."

Why did the Judge say to the jury that the question of whether or not the lands applied for by the several entrymen were lawfully of a character subject to entry under the timber and stone act, is not directly involved in a charge of a conspiracy to suborn. Simply because *he was placing upon the indictment the construction for which we are now contending, and which has always been placed upon it.* If the present construction is to prevail, and it is to be held that plaintiffs in error instigated persons to state and subscribe under their oaths that the lands were public lands, that they were open to entry under the acts mentioned, etc., then the question of whether they were open to entry, and whether they were more valuable for timber than for grazing, would be involved, because the indictment states *"matters so to be stated, subscribed and sworn by the said persons being material matters, under the circumstances, and matters which the said persons so to be suborned instigated and procured, and the said John Newton Williamson, Van Gesner and Marion R. Biggs would not believe to be true."* That is, the persons to be suborned would not believe to be true any of the matters and things which they were instigated to swear to. And under the charge in the indictment all of the matters and things which the persons to be instigated were to swear to would not be believed to be true by the persons to be suborned or the plaintiffs in error. We submit that this absolutely settles the construction that was placed upon the indictment as late as the time when the Judge was instructing the jury at the last trial.

Here we have the ruling of two Judges, each upholding our contention as to what the indictment means in the particular under consideration, the first Judge rejecting the testimony in question, because the indictment alleged in effect that the lands were more valuable for their timber than for grazing, and the second Judge at the third trial, although conceding this contention as to the meaning of the indictment, admitted the evidence on the ground that it somehow shed light upon the motives of the parties. Finally, we have the decision of the Appellate Court, overruling each of the Judges as to what the indictment means, and admitting the evidence on the ground that the indictment charges something entirely different from what both Judges who participated in the previous trials had theretofore held. It is true that the Appellate Court concurs with the presiding Judge at the last trial that the evidence was properly admitted, but it does it for radically different reasons, and on grounds that would have caused the Judge presiding at the last trial to have rejected it. No claim is now made that the testimony is admissible on any grounds stated by Judge Hunt.

This procedure may harmonize well enough with the practice in this particular case, but we submit that it is not the law.

Is the United States never estopped in the trial of a criminal case? Can it, in order to meet a certain objection to an indictment, secure one construction of the indictment, and then when another question is raised, in order to avoid a reversal, insist that the indictment means something radically different from its first contention? If the last contention is to be upheld, let the demurrer be sustained.

A man can give as good a description of how a kaleidoscope

looks to all persons under all circumstances, after looking once himself, as he can state the many different meanings that would be attributed to this indictment by different Judges, although he had given the matter the most careful consideration.

Whatever this indictment does mean, we are entitled at least to have one construction of it upheld throughout. The government has no right to place one interpretation upon the indictment to avoid the force of a demurrer, and another in order to prevent a reversal on account of the admission of evidence, especially when the last construction placed upon it would be fatal upon demurrer, and the first construction would be fatal upon the question of the admissibility of evidence.

In order to hold this indictment good, and overrule the demurrer or a motion in arrest of judgment, our construction must be placed upon it. The crime is not sufficiently set forth and described without that portion of the indictment under discussion, and if it is to be held that the portion of the indictment under discussion means what this Court has decided, it means there is absolutely *no description of an offense* to be found anywhere in the indictment that is sufficient under any case that was ever decided. The mere allegations that persons to be instigated would swear that certain lands were public lands; that they were situated in Crook County, in said district; that they were open to entry under certain acts; that they were known as timber and stone lands; that the persons to be instigated would swear that they would then be applying to enter and purchase land which they would swear were open to entry, etc., is not a description that is sufficient; neither is it a description at all, and especially is

this true when the indictment states that the persons to be instigated and the plaintiffs in error would not believe to be true the matters to be stated, subscribed and sworn to by the persons to be instigated.

Up to the commencement of this portion of the indictment under discussion nothing has been said as to what the alleged perjury was to relate.

Here it is stated, if we are correct, that it was to relate to public lands, stating where they were situated, in a general way; their character, and in what proceedings the alleged perjuries would be committed, and under our contention these things are stated as facts, not as matters that the persons instigated would swear to; but if the decision of this Court is correct there are none of these necessary facts stated anywhere in the indictment, but there is substituted therefor in effect a statement that persons would swear to these things, not believing them to be true.

This descriptive matter is of such a nature to show, if we are correct in our contention, that Biggs would be a competent person to administer an oath, and it would show that these were cases in which *a law* of the United States authorizes the administration of an oath, according to the allegations, and this must appear as perjury can be committed only by swearing falsely to material matters in a case where a law of the United States authorizes the administration of an oath. See section 5392, defining perjury. But if these things are not stated as facts, but only as matters that persons would swear to, not believing them to be true, the indictment fails in many an essential particular.

There are many things contained in the sentences and phrases under discussion that an applicant does not in fact swear to. This, of course, is not conclusive, but it throws some light on the subject, if any was needed, as all these sentences and phrases are in the same construction, and if the instigated persons were to swear to one they were to swear to all. If they were to swear that the lands were open to entry under the timber and stone act, they were to swear that they were situated in Crook County, and they were to swear that they were known as timber and stone lands, and were to swear that they would be applying to enter and purchase, etc. On the other hand, if they were not to swear to these things, according to the allegations of the indictment, then these matters are stated as facts.

Realizing that what we are about to state does not bear directly upon the question before this Court; yet, because it explains in part our feeling upon this subject, we say that the evidence concerning the timber was introduced late in the trial, and we believe it false, and all of the land, as the public records will show, to which it is claimed this conspiracy related are now set apart in a forest reserve.

We submit that the voice of authority may affirm the decision of the Court below in admitting this testimony, and in ruling upon many other points, but that the voice of reason will never so declare.

AS A FURTHER GROUND FOR A REHEARING, WE INSIST THAT THIS COURT HAS ENTIRELY OVERLOOKED AND FAILED TO PASS UPON AT ALL A MANIFEST ERROR COMMITTED BY THE TRIAL COURT, NAMELY, THE ERROR COMMITTED IN

CHARGING THE JURY THAT AS FAR AS OVERT ACTS ARE CONCERNED IT IS SUFFICIENT IF THE CONSPIRACY IS FOLLOWED BY SOME ACT DONE BY ANY ONE OF THE DEFENDANTS FOR THE PURPOSE OF CARRYING IT INTO EFFECT."

This error was discussed by us in our original brief, pages 138-141, and in our reply brief, pages 124-125; except in the oral argument, no answer is made to our contention on this point.

In the oral argument it was said in behalf of the government that this contention would be serious but for the fact that this error was cured by the charge, to the effect, that the jury, in order to convict, must find beyond a reasonable doubt that some one of the overt acts charged in the indictment was done by *any one or more of the defendants* for the purpose of effecting the object of the conspiracy. Transcript, 1458.

The indictment charges *certain overt acts against Biggs alone.*

That the first instruction is not cured by the last is too clear for argument, as the alleged curative instruction does not apply the rule correctly to this case, as it assumes that an overt act charged may have been committed *by some one other than Biggs, which is impossible.* That an overt act charged must be proved to the satisfaction of the jury, and that it is for the jury to say whether such an act, when proved, was done to effect the object of the conspiracy, is plainly the law of the land; and there is no more doubt about it than there is that twice two makes four, and a person might as well discuss the one question as the other.

However, we repeat our former citations, so that this Court may conveniently refer to the decisions:

U. S. vs. Cassidy, 67 Fed. Rep., 689.
U. S. vs. Newton, 52 Fed. Rep., 285.
U. S. vs. Goldberg, 7 Bliss (U. S.), 175.

According to the government's contention, made orally, there is only one contention here involved, and that is this: Is the erroneous instruction cured?

Nothing is said about this matter in the printed brief of the government, as we believe, because no argument could be made that would bear the light.

We ask this Court to pass upon this question and say, if this judgment must be affirmed, how it is that there is no error here; but if no plausible argument can be found, we ask a reversal.

It is not an overstatement to say that it is of the utmost public importance that these defendants have a trial according to the rules of law, and that it is of great public importance that the intelligent citizenship of the State of Oregon, that does not rely entirely upon newspaper comment, should so believe.

We think we are right in demanding a decision on this point.

If the briefs were to be printed with the opinion, so that all could see what questions were raised and what passed on, no Appellate Court would think of disregarding a question of this kind. Our rights are the same, however, whether the record discloses the whole truth or not. We assume that this point, and some others to which the Court's attention was called, were over-

looked, from the fact that they are not discussed by the printed brief of the defendant in error.

IMPEACHMENT OF THE WITNESS BRANTON.

The proposition as to whether this important witness for the defendant could be impeached in relation to COLLATERAL MATTERS this Court does not, in its opinion, *seem to pass upon at all.* We have always thought this proposition so absolutely clear under the authorities that there was no room for argument or question whatever, and that the ruling, by which the Court permitted this witness to be impeached before the jury upon purely collateral matters, was so clearly error that upon it alone the Court could not do otherwise than reverse the case.

We cannot believe that the Court intended to ignore so important a question, or what, to our mind, is so clear an error, and, therefore, we must assume that in the vast amount of literature that has been presented in the case the Court has overlooked this question. We, therefore, call the attention of the Court again to a discussion of this point upon pages 140 to 150 of the reply brief, and especially to the authorities cited on page 149 and on page 150, as well as to the discussion of the same question on pages 142 to page 145 of the main brief.

The other points presented in the main brief are directly passed upon by this Court, and we will not ask the Court for a re-consideration of its rulings thereon. But as it seems to us, in relation to the matters herein presented, that the Court can only reach the conclusion of affirmance in this case by entirely overlooking the two clearest and unanswerable points in plaintiffs' contention, about which there is not the least chance for argument, and by a construction of the indictment in relation to the timber matter, which we submit, that this Court itself cannot, after a careful examination, insist upon.

In saying this we do not forget the insignificance of the writers of this brief, or the little influence to which their mere opinion is entitled; but we have trust and confidence that in this honorable court, however humble and obscure may be the attorneys for the plaintiffs in error, if they have ANYTHING TO SAY, it will receive the same fair consideration and careful attention as if presented by the most eminent attorneys in all the land.

If this case were being tried in the court of some despotic land, where such court was wholly dependent upon the government, and was its mere instrument to declare its will, we might think that it was useless to attempt to press this matter further, feeling that such a court would find some way to decide in favor of the government, in a matter where such government was directly interested, and that, if it were clearly shown that one position was untenable, it would fasten to some other way by which the same result would be reached.

But in our land, where the courts are entirely independent, and where it is our pride and our boast that it is so, we have confidence that the wishes, or feelings, or desires of the government will have no influence, and that the humblest suitor will receive the same consideration as the most powerful, or as the government itself; and in this spirit we ask the Court whether, if this were a civil case involving only the civil rights of parties, and not their liberty and reputation, would such an error as the one in the matter of the impeachment of the witness Branton be overlooked for a moment, or would a judgment depending thereon be permitted to stand for any longer time than it took to get the mandate of this Court to the court below?

As we have already shown, case after case, both civil and criminal, have been reversed upon this identical ground, and in one of those cases the honorable Judge who delivered the opinion in this case participated. (See Pierce vs. Schaden, 59 Cal., 540).

In view, then, of these considerations, we respectfully ask the Court for a rehearing upon the questions hereinbefore presented.

There is another matter which we desire to submit to the Court as a matter of right and justice. One branch of this same case is now pending before the Supreme Court of the United States, and it will very soon be decided. In passing upon that

case, if the Court takes jurisdiction at all, it will necessarily pass upon the MERITS OF EVERY QUESTION WHICH IS INVOLVED HEREIN.

It is sometimes assumed that in a case of this kind a party can only go into the Supreme Court on the question of JURISDICTION ALONE, and there is something in the opinion of the Court in this case that seems to indicate that the honorable Judge who wrote the same had that in mind; but we submit that this grows out of a confusion of a case like this with a case which is certified up by this Court, or which goes up on appeal on JURISDICTIONAL grounds. Here the question is not JURISDICTIONAL, but CONSTITUTIONAL, and a different rule applies; and if it is a constitutional question which is not frivolous, the Supreme Court takes it up and passes not only upon the constitutional question, but also upon *everything presented* BY THE RECORD IN THE CAUSE.

In the Burton case, the case went up to the Supreme Court upon exactly the same grounds as in this case. That is, upon the ground that a constitutional question was involved in the sentencing of a Congressman or member of the Senate in any way, which, if carried out, would interfere with his attendance at the sessions of Congress; and the Court held that this question was not frivolous, and was sufficient to bring up the whole record, and the Court reversed the case on *other* GROUNDS, refusing to pass upon the constitutional question at all, saying:

> "However that may be, the question IS NOT FRIVOLOUS, and in such a case the statute grants to this Court jurisdiction to issue a writ of error directly to the District Court, and then to decide the case WITHOUT BEING RESTRICTED TO THE CONSTITUTIONAL QUES

TION. It is not the habit of the Court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case. Having jurisdiction to decide all questions in the case upon this writ of error, we deny the motion for a certiorari (it seems there must have been an application for a certiorari extraordinary from the Supreme Court to the Court of Appeals, or to the Circuit Court) and proceed to an examination of the record."

And, as we have seen, the Court did proceed to examine the whole record and pass upon all the questions involved except the constitutional one, which really brought the case there, which was left undecided.

Burton vs. United States, 196 U. S., 283.

It being clear, then, that the Supreme Court will pass upon every point involved in this case on exactly the same record and that very shortly, we respectfully ask the court to let the final decision in these cases rest until the Supreme Court shall have passed upon the questions involved so that if the Supreme Court shall perchance find that there was error in the Court below, that we may have the advantage of their learning and erudition and the reasoning they may offer upon a re-hearing in this court.

To our minds there could be nothing that would so discredit the administration of the law in the minds of the public and so destroy that confidence of the people in the law and the courts which all agree is so important and so much to be desired, as the fact (if it should turn out to be a fact) that these two defendants should be serving a sentence in jail when the Supreme Court of

the United States upon the same record had declared THAT THEY HAD NOT HAD A FAIR TRIAL ACCORDING TO THE RULES OF LAW.

Of course this court has it in its power to push the ultimate decision of this case ahead and to bring it in in advance of that of the Supreme Court and in that event its decision would be controlling upon these defendants and they would have no redress, but we appeal to the discretion of the court in this matter and ask that it be not done. The delay cannot be great and a few weeks intervening we submit, as a mere matter of time, are of no great importance to the government or to the defendants.

Respectfully submitted,

H. S. WILSON,

A. S. BENNETT,

Attorneys for Plaintiffs in Error.

I, Alfred A. Bennett, and I, H. S. Wilson, hereby certify that I am counsel for Van Gesner and Marion R. Biggs, plaintiffs in error named in the foregoing petition for rehearing filed in their behalf and I hereby certify that in my judgment said petition for rehearing is well founded and that it is not interposed for delay.

ALFRED S. BENNETT,

H. S. WILSON,

Counsel for Van Gesner and Marion R. Biggs, Plaintiffs in Error and Petitioners for Rehearing.

No. 1371

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

HERBERT STRAIN,

Appellant,

vs.

H. B. PALMER, Receiver,
BENJAMIN GRAHAM, Trustee,
THE AMERICAN FREEHOLD LAND MORTGAGE COMPANY OF LONDON, ENGLAND, LIMITED, H. H. NELSON SHEEP COMPANY, H. H. NELSON AND JAMES T. STANFORD,

Appellees.

Transcript of Record.

Upon Appeal from the United States Circuit Court for the District of Montana.

FILMER BROS. CO. PRINT, 1642 HOWARD STREET, S. F.

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INDEX.

In the Circuit Court of the United States, Ninth Circuit, for the District of Montana, Sitting in Equity.

No. 705.

BENJ. GRAHAM, Trustee, et al.,

Complainants,

vs.

H. H. NELSON SHEEP COMPANY, et al.,

Defendants,

H. B. PALMER, Receiver,

Appellees,

HERBERT STRAIN, Petitioner pro interesse suo,

Appellant.

Order Enlarging Time to File Record on Appeal to September 28, 1906.

Upon good cause shown, it is ordered that the time within which the above named appellant may docket the cause above-entitled and file the record thereof with the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit be, and is hereby, enlarged and extended by the Judge who signed the citation on the appeal, to and including the 28th day of September, 1906.

Made this 20th day of August, 1906, and before the expiration of the 30 days, ending on September

7, 1906 from and after the signing of the citation on said appeal.

CHAS. E. WOLVERTON,

Judge.

[Endorsed]: No. 705. In the Circuit Court of the United States, Ninth Circuit, for the District of Montana. Benj. Graham, Trustee, et al., Complainants, vs. H. H. Nelson Sheep Co. et al., Defendants. H. H. Palmer, Receiver, Appellees. Herbert Strain. Petitioner pro interesse suo, Appellant. Order Enlarging Appellant's Time to File Record on Appeal, to September 28, 1906. No. 1371. United States Circuit Court of Appeals for the Ninth Circuit. Filed Sep. 5, 1906. F. D. Monckton, Clerk. Refiled Sep. 7, 1906. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

HERBERT STRAIN, Petitioner pro Interesse suo, Appellant,

vs.

H. B. PALMER, Receiver, BENJAMIN GRAHAM, THE AMERICAN FREEHOLD LAND MORTGAGE COMPANY OF LONDON, ENGLAND, LIMITED (a Corporation), H. H. NELSON SHEEP COMPANY (a Corporation), H. H. NELSON, and JAMES T. STANFORD,

Appellees.

Stipulation and Praecipe.

It is hereby stipulated that the following designated parts of the record in the cause above entitled on appeal from the Circuit Court of the United States for the District of Montana are the only parts of said record which are necessary to the hearing in said Circuit Court of Appeals, and that such parts only be printed by the Clerk of the Court last named, to wit:

1. Bill of complaint, beginning on page 1 of the original certified record, omitting the affidavit of M. S. Gunn and inserting in lieu thereof "(duly verified)."

2. Subpoena, page 20.

3. Order to show cause, page 22, dated April 14, 1904.

4. Consent to appointment of receiver, page 24, filed September 3, 1904.

5. Order appointing receiver, page 25, filed September 3, 1904.

6. Decree of foreclosure, page 28, entered February 4, 1905, omitting therefrom the description of the real estate ordered to be sold, and inserting in lieu of such description, "(Description of lands as in Bill of Complaint, omitted under stipulation of parties)."

7. Petition of Herbert Strain pro interesse suo, page 38.

8. Order requiring receiver to answer petition pro interesse suo, page 44.

9. Report of Sale by Master in Chancery, page 45, filed April 4, 1905, omitting the affidavit of publication, and inserting in lieu thereof "(Affidavit of publication of notice of sale, omitted under stipulation)."

10. Certificate of Sale, page 54, filed April 1 1905, omitting description of lands sold, and inserting in lieu thereof "(Description of lands as in Complaint and Decree omitted under stipulation)."

11. Receipt, Exhibit "C," page 58, filed and entered April 4, 1905.

12. Agreed statement of facts, page 60, filed June 12, 1905.

13. Order denying petition pro interesse suo page 66, filed February 26, 1906.

14. Report of H. B. Palmer, receiver, page 67 filed April 21, 1906, omitting verification by Palmer

15. Objections of Strain, petitioner pro interesse suo, to receiver's report, page 72, filed May 5, 1906.

16. Order, entered May 28, 1906, overruling objections to and approving receiver's account, page 74.

17. Order amending order of May 28, 1906 made May 31, 1906, and filed and entered nunc pro tunc as of May 28, 1906, page 76.

18. Petition for allowance of appeal and order granting same and fixing bond, page 78.

19. Assignment of errors and prayer for reversal, page 81.

20. Bond on appeal, page 87.

21. Citation on appeal, page 90.

22. Certificate of clerk, page 93.

In printing the Clerk will omit the order withdrawing the answer of defendant James T. Stanford, filed January 23, 1905; and all papers except those hereinbefore enumerated; and also omit title of court and cause after Bill of Complaint, and insert in lieu thereof: "(Title of Court and Cause)."

It is further stipulated that the said cause shall be heard upon the assignment of terrors accompanying said petition for an appeal.

A. C. GORMLEY and
W. T. PIGOTT,
Solicitors and Counsel for the Appellant.

M. S. GUNN,
Solicitor and Counsel for Appellees.

To the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit:

Sir: You will please print the record in the cause above entitled pursuant to the foregoing stipulation.

A. C. GORMLEY,
W. H. PIGOTT,
Solicitors and Counsel for Appellant.

[Endorsed]: No. 1371. In the United States Circuit Court of Appeals, for the Ninth Circuit.

Herbert Strain, Petitioner Pro Interesse Suo, Appellant, vs. H. B. Palmer, Receiver, et al., Appellees. Stipulation and Praecipe. Filed Sep. 7, 1906. F. D. Monckton, Clerk.

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

IN EQUITY.

BENJAMIN GRAHAM, and the AMERICAN FREEHOLD LAND MORTGAGE COMPANY OF LONDON, ENGLAND, LIMITED (a Corporation),

Complainants,

vs.

H. H. NELSON SHEEP COMPANY (a Corporation), H. H. NELSON and JAMES T. STANFORD,

Defendants.

Bill of Complaint.

To the Honorable the Judges of the Circuit Court of the United States for the District of Montana:

Benjamin Graham, a citizen of the State of New York, and The American Freehold Land Mortgage Company of London, England, Limited, a corporation organized and existing under and by virtue of the laws of the Kingdom of Great Britain and Ireland, bring this their bill of complaint against the

H. H. Nelson Sheep Company, a corporation organized and existing under and by virtue of the laws of the State of Montana, and H. H. Nelson and James T. Stanford, each of whom are citizens of the State of Montana, and thereupon your orators complain and say:

1. That your orator, Benjamin Graham, is now and was at all times herein mentioned a resident and citizen of the State of New York, and your orator, The American Freehold Land Mortgage Company of London, England, Limited, is now and was at all of said times a corporation organized and existing under and pursuant to the laws of the Kingdom of Great Britain and Ireland.

2. That the defendant, H. H. Nelson Sheep Company, is now, and was at all the times herein mentioned, a corporation organized and existing under and by virtue of the laws of the State of Montana, and the defendants, H. H. Nelson and James T. Stanford, and each of them, are now and were at all of said times residents and citizens of said State.

3. That the amount in controversy in this suit exceeds the sum of two thousand dollars, exclusive of interest and costs.

4. That on the 20th day of March, 1901, the defendant, H. H. Nelson Sheep Company, made, executed and delivered to your orator, The American Freehold Land Mortgage Company of London, Eng-

land, Limited, its two certain promissory notes or bonds, with coupon or interest notes attached thereto, each of which principal promissory notes or bonds is for the sum of fifteen thousand dollars, and is in the words and figures following:

$15,000. No. 132.

UNITED STATES OF AMERICA.

FIRST MORTGAGE BOND.

Helena, Montana, March 20th, 1901.

On the twentieth day of March, A. D. 1906, for value received, the maker or makers of this bond promise to pay The American Freehold Land Mortgage Company of London, England, Limited, or order, fifteen thousand dollars ($15,000.00), payable in lawfully coined gold money of the United States of America, with interest thereon payable in like money, at the rate of seven per centum per annum, interest payable semi-annually; according to the tenor and effect hereof, and of ten interest or coupon notes hereto attached Both principal and interest notes are negotiable and are payable at the office of H. B. Palmer & Company, in the city of Helena, Montana, with current exchange on New York, and without and relief whatever from valuation or exemption laws.

It is agreed, that if any part of the principal or interest is not paid at maturity it shall bear interest after maturity at the rate of ten per centum per annum, payable in like manner as hereinbefore ex-

pressed; and if any part of the interest is not paid when it becomes due it shall be calculated and paid at the rate of ten per centum per annum, instead of at seven per centum per annum as set forth in the interest coupons attached; and if any part of the interest remains unpaid for 30 days after it becomes due, it shall cause the principal to become due and collectible at once, without notice, at the payee's option, and the mortgage or deed of trust securing this bond may be enforced in accordance with the terms thereof, together with 4 per cent attorney's fees to be taxed as costs in the event of a suit being instituted for the collection of this bond or any interest thereon.

The maker or makers of this bond reserve the right to make partial payments on the principal thereof at any regular interest period as herein set forth after April 1st, 1902, in sums of not less than $1,500, and on payments so made the interest shall cease from date of such payments, and the interest coupons shall be reduced in pro rata proportion; and all payments so made are payable at the same place and in the same manner, where this bond is payable as hereinbefore set forth; and provided that not less than thirty days' notice in writing, shall be given to the payee by the maker or makers of this bond of the intention to make such payment. The principal and interest of this bond are secured by a mortgage or deed of trust, which is a first lien on real estate

situated in Cascade County, Montana, and duly authorized by a resolution of the stockholders of the corporation issuing the same at a meeting regularly called and held on the twelfth day of March, 1901.

H. H. NELSON SHEEP COMPANY,
[Corporate Seal] By H. H. NELSON,
President.
Attest: ANNA A. NELSON,
Secretary.

(The instrument given to secure this obligation has been duly stamped as required by law.)

5. That at the time of the execution and delivery of said promissory notes or bonds the defendant H. H. Nelson guaranteed the payment of the principal and interest of each thereof, which said guaranty is evidenced by an indorsement in writing upon each of said promissory notes or bonds, signed by the said H. H. Nelson.

6. That on the said 20th day of March, 1901, the said defendant H. H. Nelson Sheep Company made, executed and delivered to your orator Benjamin Graham, as trustee, its mortgage or trust deed, wherein and whereby it granted, bargained, sold and conveyed to your orator as trustee certain property described therein, as security for the payment of said principal sum and interest mentioned in said promissory notes or bonds as the same should respectively become due and payable, and also as security for the

performance of the covenants in said mortgage or trust deed contained.

7. That said mortgage or trust deed was duly asknowledged and certified so as to entitle it to be recorded, and the same was afterwards and on the 28th day of March, 1901, duly recorded in the office of the county clerk and recorder of Cascade County, Montana, in book 18 of Mortgages, page 249; a copy of which said mortgage or trust deed, with the indorsements thereon, is hereunto annexed, marked Exhibit "A," and prayed to be taken and considered as a part of this bill of complaint the same as though set forth herein in haec verba.

8. That the interest on said principal sum mentioned in said promissory notes or bonds and in the said mortgage or trust deed has been paid down to the first day of October, 1902, but no part of the principal sum has been paid; that your orators, pursuant to the option and privilege granted and conferred by said promissory notes or bonds and said mortgage or trust deed so to do, have declared and hereby declare the entire principal, to wit, the sum of thirty thousand dollars ($30,000.00), due and payable.

9. That the said defendant, H. H. Nelson Sheep Company, has failed to keep the buildings on said property or premises insured as by the said trust deed or mortgage it covenanted or promised to do, in consequence whereof your orator, Benjamin Graham, trustee, has caused the said buildings to be

insured, and has paid therefor the premium of $70.25.

10. That your orator, The American Freehold Land Mortgage Company of London, England, Limited, is the lawful holder and owner of said promissory notes or bonds and said interest or coupon notes attached thereto.

11. That the defendant, James T. Stanford, as agent for the stockholders of the Northwestern National Bank of Great Falls, Montana, has or claims to have some interest or claim upon said premises and property described in said trust deed or mortgage, or some part thereof, as mortgagee or otherwise, which interest, if any, has accrued subsequent to the execution, delivery and recording of said trust deed or mortgage, and is subject, subservient and subsequent to the lien created thereby.

12. Your orators further show that the real estate and property described in said trust deed is insufficient as security for the payment of the said principal sum and interest and the performance of the covenants to be kept and performed by the said H. H. Nelson Sheep Company as provided in said trust deed or mortgage, and that the said H. H. Nelson Sheep Company and the said H. H. Nelson are each and both insolvent.

13. Your orators further show that the said defendant, H. H. Nelson Sheep Company, is in posses-

sion of said premises and property described in said trust deed or mortgage, and has for more than one year last past collected and received the rents, issues, income and profits of said property, appropriated the same to its own use, and failed and refused to apply any part thereof to the payment of either the principal or interest secured by said trust deed or mortgage, or the payment of the premium for the insurance of the building thereon, and that unless a receiver is appointed as prayed for in the prayer hereto the said H. H. Nelson Sheep Company will continue to collect and receive the rents, issues, income and profits of said property, and appropriate the same to its own use as it has been doing.

14. That a solicitor's fee in this suit of four per cent of the amount due is reasonable and fair, and should be allowed and paid as in and by said promissory notes and bonds and said trust deed or mortgage provided.

15. That four per cent of the whole amount due and unpaid is a reasonable and fair compensation and commission to be allowed and paid your orator, Benjamin Graham, for his services as trustee, as in and by said mortgage or trust deed provided.

In consideration whereof, and inasmuch as your orators are remediless at and by the strict rules of the common law and are only relievable in a court of equity where matters of this and the like nature are cognizable and relievable, to the end that the said

defendants hereafter named may and each of them may full, true, direct and perfect answer make to your orators bill of complaint (but without oath, the answer of the said defendants or either of them under oath being hereby expressly waived pursuant to the provisions of the general Equity Rules governing Circuit Courts of the United States), and as fully and particularly as if the same were again repeated, and they and each of them were thereunto particularly interrogated, your orators pray:

That the usual decree may be made for the sale of said mortgaged premises aforesaid according to law and the rules and practice of this Court; that the proceeds of such sale may be applied to the payment of the costs and expenses of this suit, and in other respects as provided in said trust deed or mortgage; that the said defendant, H. H. Nelson Sheep Company, and all persons claiming by, through or under it subsequent to the execution of said mortgage upon said premises, either as purchasers, encumbrancers, or otherwise, may be barred and foreclosed of all rights, claim or equity of redemption in and to said premises and every part thereof, and that your orators may have a judgment against said Sheep Company and H. H. Nelson for any deficiency remaining after the application of the proceeds as aforesaid.

And your orators further pray that a receiver be appointed according to the course and practive of this court with the usual powers of receivers in like

cases, of all the property described in said mortgage or trust deed, and the income, rents, issues and profits thereof, to hold and dispose of the same as by this Honorable Court may be ordered, and that said H. H. Nelson Sheep Company be decree to transfer and deliver possession of said property and the whole thereof to the receiver so appointed; and that your Honors will enjoin the said defendant H. H. Nelson Sheep Company, its solicitors, officers, agents and servants from in any manner disposing of any of the property subject to said mortgage, or any of the income, rents, issues or profits thereof, or from interfering with or in any manner hampering, delaying, or preventing such person as may be appointed receiver in the performance of the duties imposed upon him by said Court; and that your Honors will, until the hearing of the application for the appointment of such receiver, enjoin and restrain said defendant H. H. Nelson Sheep Company, its solicitors, officers, agents and servants, from in any manner disposing of any of the property subject to said mortgage or trust deed, or the income, rents, issues or profits thereof, or transferring the possession thereof, or any thereof; and that your orators may have such other and further relief as the nature of this case may require and as may be agreeable to equity and good conscience.

And may it further please this Honorable Court to grant unto your orators the most gracious writ of

subpoena, in the name of the President of the United States, issuing out of and under the seal of this Honorable Court, to be directed to the said defendants H. H. Nelson Sheep Company, H. H. Nelson and James T. Stanford, therein and thereby commanding them and each of them by a certain day and under a certain penalty therein to be inserted, personally to be and appear before this Honorable Court, then and there to answer this, your orator's bill of complaint, and further to stand to, abide by and perform such order and decree as the Court may make in the premises, and as shall be agreeable to equity and good conscience.

And your orators will ever pray, etc.

MILTON S. GUNN,

Solicitor and of Counsel for the Complainants.

[Duly verified.]

Subscribed and sworn to before me this 11th day of April, A. D. 1904.

[Seal] JNO. K. SCOTT,

Notary Public, Lewis and Clarke County, State of Montana.

Exhibit "A."

$30,000. TRUST DEED. No. 132

This indenture, made and entered into this 20th day of March A. D. 1901, by and between the H. H. Nelson Sheep Company, a corporation duly organized under the laws of the State of Montana, the party of the first part (and hereinafter for brevity

designated the grantor); and Benjamin Graham, Trustee, the party of the second part (and hereinafter for brevity designated the trustee), and The American Freehold Land Mortgage Company of London, England, Limited, the party of the third part, witnesseth:

That the party of the first part for and in consideration of thirty thousand dollars ($30,000) in lawfully coined gold money of the United States of America, in hand paid, by the party of the third part, the receipt of which is hereby acknowledged, has granted, bargained, sold and conveyed, and does by these presents grant, bargain, sell, convey and confirm unto the said party of the second part, with full power of substitution, and to successors in trust and assigns, forever, the certain tract or parcel of land situate, lying and being in the county of Cascade and State of Montana, and particularly described as follows, to wit:

Lands in township nineteen (19) north, range one (1) east of the principal meridian Montana as follows:

The southeast quarter of the northeast quarter of section twenty-two (22) containing forty acres; also

The south half of section twenty-three (23), and the south half of the northeast quarter of said section twenty- three (23), and the south half of the northwest quarter of said section twenty-three (23)

containing four hundred and eighty (480) acres in said section twenty-three (23); also

The southwest quarter, and the southwest quarter of the nortwest quarter of section twenty-four (24) containing two hundred (200) acres in said section twenty-four (24); also

The following lands in section twenty-five (25), to wit: The north half of the northeast quarter; the the southeast quarter of the northeast quarter, the north half of the northwest quarter, the south half of the northwest quarter, and lot number two; or a total area in said section twenty-five (25) of two hundred and sixty-three and sixty seven one hundredths (263.67) acres. Also

The following lands in section twenty-six (26), to wit: The northeast quarter, and the northeast quarter of the northwest quarter, and the east half of the southwest quarter, and the southeast quarter; or a total of four hundred and thirty-nine and ten one-hundredths (439.10) acres in said section twenty-six (26). Also

The east half of the southeast quarter of section thirty-two (32) containing eighty (80) acres; also

The southwest quarter of section thirty-three (33) containing one hundred and sixty (160) acres; also

The northeast quarter of the southeast quarter and lot number one in section thirty-four (34) containing seventy-eight and sixty one-hundredths (78.60) acres; also

The northwest quarter and lots, numbers one and four in section thirty-five containing two hundred and twenty-three and fifty-eight one-hundredths (223.58) acres; and being a total acreage in said township nineteen of nineteen hundred and sixty-four and eighty-five hundredths (1964.85) acres more or less, according to the official survey of the United States; and also lots numbers two (2) and three (3) in section thirty-five (35), township nineteen (19) north, range one (1) east, containing seventy-five (75) acres, more or less.

Also the following lands in township eighteen (18) north, range one (1) east, to wit:

Lots numbered one (1), two (2), five (5) and six (6), in section three (3), containing ninety and sixty-seven one-hundredths (90.67) acres.

Also the following lands in section four (4): Lots numbered three (3), four (4), five (5), seven (7), and the north half of the southwest quarter, and the south half of the northwest quarter, and the southwest quarter of the northeast quarter; or a total acreage in said section four (4) of three hundred and fifty-nine and nine one-hundredths (359.09) acres.

Also lot number one (1) in section five (5), containing forty-three and twenty-one one-hundredths (43.21) acres.

Also lots numbered one (1), two, (2), three (3), and the north half of the northwest quarter of sec-

tion seventeen (17), containing one hundred and ninety-five and three one-hundredths (195.03) acres.

Also the east half of the northeast quarter, and lot number seven (7) of section eighteen (18), containing ninety-six and ninety-nine one-hundredths (96.99) acres; and being a total of seven hundred and eighty-four and ninety-nine one-hundredths (784.99) acres in said township eighteen north, range one (1) east.

Also the south half of the northeast quarter, and the north half of the southeast quarter of section twenty-six, in township four (4) north, range one (1) east, containing one hundred and sixty (160) acres.

Also the west half of the southwest quarter of section twenty-nine, and the southeast quarter of the northeast quarter, and the northeast quarter of the southeast quarter, of section thirty (30), all in township five (5) north, range one east, containing one hundred and sixty (160) acres.

Also the following lands in townsihp eighteen (18) north, range one (1) west, as follows:

The south half of the south half of section nine (9), containing one hundred and sixty (160) acres.

Also the south half of the southwest quarter of section thirteen (13), containing eighty (80) acres. Also the south half of section fifteen, and also the south half of the north half, and the northeast quarter of the northwest quarter, and the northwest quarter of the northwest quarter of said section fif-

teen (15), or a total acreage in said section fifteen of five hundred and sixty (560) acres;

Also all of section twenty-three (23), containing six hundred and forty (640) acres.

Also the south half of the southwest quarter, and the northwest quarter of the southwest quarter of section ten (10) containing one hundred and twenty (120) acres.

Also lots numbered two (2), three (3), and four (4), and the south half of the northeast quarter of section twenty-four (24), or a total acreage in said township eighteen north, range one (1) west of seventeen hundred and twenty-one and twenty-one one-hundredths (1722.21) acres, more or less, and all of said lands hereinbefore designated comprising a combined acreage of four thousand eight hundred and sixty-seven and five one-hundredths (4,867.05) acres, more or less, according to the official survey of the United States of America.

(Warranty.) Together with all and singular the tenements, improvements, hereditaments, appurtenances, easements, water rights and all other rights belonging or in anywise appertaining thereto, unto the said trustee, and successors in trust and assigns forever. The grantor represents to and covenants with the said trustee and successors in trust and assigns that it is well and truly seised and in possession of the foregoing described premises, and that the same is free and clear of all encumbrance except

this indenture which is the first and only lien at the time of the execution hereof, and will warrant and defend said premises against the lawful claims of all persons whomsoever.

(Obligation.) Provided always: That this conveyance is made in trust for fulfillment of, and securing and enforcing the obligations undertaken in these presents, and upon the following express conditions, to wit: That the said grantor shall pay or cause to be paid to the said party of the third part, successors and assigns, the sum of thirty thousand dollars ($30,000), together with interest thereon from the twentieth day of March, A. D. 1901, said sum of money being represented by two principal notes, each for the sum of fifteen thousand dollars ($15,000) maturing on the twentieth day of March, A. D. 1906, and ten interest or coupon notes thereto attached (to each of said principal notes), one for the sum of $555.70 maturing October 1, 1901, and eight each for the sum of $525 maturing on the first days of April and October of each succeeding year respectively, and one note for $494.30 maturing March 20th, 1906; all of said notes negotiable and payable at the office of "H. B. Palmer & Company" in the city of Helena, Montana, and made by the grantor herein, to the said party of the third part; with exchange on New York and interest after maturity at the rate of ten per cent per annum, payable

annually, and according to the tenor and effect of said principal and interest or coupon notes.

(Agreement.) It is agreed that if the said grantor or maker of the obligation secured by this indenture fail to pay any or either of said principal, interest or coupon notes at maturity, (or for 30 days thereafter) or taxes, assessments or insurance, as hereinafter provided, or fail to comply with any of the conditions of this indenture, then all of said debt secured hereby shall, at the option of the trustee, successors or assigns, become due and collectible, and all rents and profits of said property shall then immediately accrue to the benefit of said party of the third part, and the occupants of said property shall pay rent to the trustee, successors or assigns, or his or their agent, and the conditions of this indenture may be enforced for the full amount, together with costs, taxes, insurance, cost of abstract of title, and any other or all sums advanced or expenses incurred on account of the grantor and by reason of these presents for whatsoever purposes; and any advances paid shall draw interest at the rate of ten per cent per annum and be liens under this indenture. And upon such failure, default or violation aforesaid, the grantor herein does fully empower said trustee, original, substituted, successors or assigns, and it is hereby made his special duty at the request of the holder of the obligations

secured hereby, at any time made after default as aforesaid, to take such steps as may be necessary for the collection of said debt, principal and interest, and to collect and sue for any rents due, or to become due on said premises, and without process of law to enter upon and take possession of, or let said premises, and either before or after said entry, when the trustee, his successors or assigns, shall see fit, to sell the property herein conveyed, or any part thereof, together or in parcels, at public auction for cash, or on credit, at a place, time, and after the advertisement by him given, substantially conforming to and as required by law in the cases of sales on execution at the time of sale, and to execute and deliver to the purchaser or purchasers thereof, good and sufficient deed or deeds in fee simple for the same, which shall vest the complete and unencumbered title of said property, and be a bar against the grantor herein, its successors and assigns, and all persons claiming under it or any of them, of all right, interest or claim in and to said property, and all parts thereof, to receive the proceeds, the same to be applied in order as follows: First, to the proper expenses of advertising, selling and conveying as aforesaid, including the necessary traveling expenses of the trustee, and a commission to the trustee of four per cent, upon the whole amount due and unpaid; second, to the payment of taxes, insurance and other outlays paid under and by virtue of these presents, with interest;

third, to the payment of the sums due by virtue of said notes for principal and interest, together with any court costs; and lastly, the remainder of such proceeds to be held subject to the order of the grantor herein.

It is further agreed that if said proceeds be not sufficient to pay all the sums above designated in the order above set forth, that then any and all sums applicable upon the principal or interest represented by the said notes shall be by the trustee credited thereon, the grantor hereby agreeing to pay any residue remaining unpaid, and consenting that the holder of the said notes may proceed in law or in equity, at any time, for the collection of the same with interest, in accordance with the effect and tenor of the said notes thus remaining unpaid; and immediately upon said sale by the trustee, successors or assigns, to yield quiet possession to the purchaser of the premises and property so sold and conveyed, provided, earlier possession of the same be not taken by the trustee before the sale as hereinbefore provided, and that said party of the third part, its successors or assigns, may, at its or their option, be the purchaser or purchasers at said sale, or at the judicial sale of the same, as hereinafter provided for in case of foreclosure under decree of court.

It is further agreed that in case proceedings to enforce the conditions of this indenture and the payment of the said amounts under the power of sale

on the part of the trustee, his successors or assigns, as herein conferred, be not at his or their option desirable, then and in that event, recourse may be had to an action in the courts for such enforcement, and that there shall be included in the judgment of foreclosure, in addition to the items hereinafter set forth or above designated, exclusive of the commissions of the trustees and the expenses incident to a sale by him, an attorney fee of four per cent on the amount of the principal recovered, which fee shall be a lien upon said property, and taxed and collected as other costs in said action; and that at the commencement of said suit, or at any time upon application of the plaintiff or plaintiffs therein, a receiver may be appointed by the Court pending said suit, and until the period of redemption expires, to care for said property, rent the same and collect such rentals and make disposition of said rents under the order of the Court. And the omission of the trustee, successors or assigns, to exercise his or their option in said matter or to proceed by reason of any default of the grantor in payment as aforesaid, at any time or times, shall not preclude said trustee, successors or assigns from the exercise thereof at any subsequent time or upon any subsequent default or defaults of the grantor in payment as aforesaid; and said trustee, successors or assigns, is not required to give any written or other notice whatsoever as to the exercise of said option, but may proceed at any

time or times to avail himself or themselves of the powers conferred, or to enforce the conditions of this indenture and to sell the property hereinbefore described by exercise of the power of sale herein conferred, or by recourse to the court.

It is further agreed, that should said trustee, successors in interest or assigns, become involved in litigation by reason hereof, or should the title of the grantor be called in question in any action or proceeding in any court, or before the land department of the United States, and the trustee, successors or assigns, should make expense by reason thereof, or incur expense in defending for the grantor, then all the costs and expenses incurred therein shall be paid by the grantor and the same may be recovered as part of the money secured hereby.

It is further agreed, that so much of the lands hereinbefore described, occupied as the right of way, and heretofore conveyed as right of way to the Montana Central Railroad Company, are exempt from the operations and lien of this indenture.

It is further agreed, that until said debt is fully paid, the grantor shall keep all required taxes and assessments against the said property fully paid, and shall keep an insurance in a reliable insurance company or companies to the amount of five thousand dollars on the buildings on the described premises, for the benefit of said trustee, successors and assigns, and deliver to him or them, or his or their

agent, said policy or policies of insurance and renewals thereof, to be held until said debt is fully paid, and it is hereby agreed that said insurance shall be in a company or companies designated by the said trustee, successors or assigns, or his or their agent, and in the event of their being any assessment or taxes levied or made against this indenture, or the debt or any part thereof secured thereby, the said grantor agrees to pay such taxes and assessments as part of the consideration hereof, and on default the trustee, successor or assigns, may pay such encumbrance, insurance, taxes or assessments, and collect the amount thereof with ten per cent interest, and in the event of any taxes or assessments becoming delinquent, and the said trustee, successors or assigns, purchasing said property at public sale, it is hereby fully agreed that said trustee, successors or assigns, shall be entitled to the full penalty authorized by the law to be added to the amount of said taxes or assessments so paid, which entire sum shall then become a part of this debt, and bear interest at the rate of ten per cent per annum from date of purchase.

It is further agreed, that the said grantor shall keep all buildings, fences, ditches and other improvements on said premises in as good repair and condition as they are at this date, and shall not remove any of said without the consent of said trustee, successors or assigns; and it is mutually agreed that

the said trustee shall have power to appoint a substituted trustee, to carry out all or any part of these presents, which appointment may be evidenced either by a writing or in any other proper manner, and may withdraw such appointment and resume acting at his pleasure. And in case of the death, absence, inability or refusal of the trustee named herein to act, then H. B. Palmer of Helena, Montana, is designated and appointed and made successor in trust to the trustee hereinbefore named, with like power and authority.

Finally, the said grantor hereby expressly agrees to comply with and perform all the foregoing conditions, and upon compliance therewith these presents to be void, otherwise to remain in full force and effect, and that the reconveyance or release of the said property from the operation of this indenture is to be made at the expense of the said grantor on full payment of the indebtedness at maturity and after fully complying with the conditions of this indenture.

It is hereby certified and recited, that this indenture and the obligations secured hereby are duly authorized by and in pursuance to a resolution of the stockholders of the H. H. Nelson Sheep Company passed at a meeting regularly called and held on the twelfth day of March, A. D. 1901. Wherein the trustees were duly empowered and authorized to execute the same, and of a similar resolution of the

trustees passed at a meeting regularly called and held on the twelfth day of March, 1901. And wherein the President and Secretary of the company were duly authorized and empowered to execute this indenture for and in behalf of the company.

In witness whereof, the said H. H. Nelson Sheep Company of Montana has caused these presents to be duly executed by its President and attested by its Secretary and the corporate seal of the company to be hereto affixed at Riverdale Stock Farm, and office of the company in Cascade County, Montana, this —— day of March, A. D. 1901.

H. H. NELSON SHEEP COMPANY.

[Corporate Seal] By H. H. NELSON,
President.

Attest: ANNA A. NELSON,

($14.50—Internal Revenue Stamps duly canceled.)

ACKNOWLEDGMENT.

State of Montana,
County of Cascade,—ss.

On this twenty-first day of March, A. D. 1901, before me, Ransom Cooper, a notary public in and for said county, personally appeared H. H. Nelson, known to me to be the president, and Anna A. Nelson, known to me to be the secretary respectively, of the corporation that executed the within instrument,

and who acknowledged to me that such corporation executed the same.

In testimony whereof I have hereunto subscribed my name and affixed my official seal the day and year in this certificate first above written.

[Notarial Seal] RANSOM COOPER,
Notary Public in and for Cascade County and State of Montana.

My commission as notary public expires January 27th, 1903.

[Endorsed]: Office of County Clerk and Recorder, County of Cascade, Montana. I hereby certify that the within deed was filed for record in this office on the 28th day of March, 1901, at 5:05 o'clock P. M., and was duly recorded in Book 18 of Mtgs., page 249.

VINCENT FORTUNE,
County Clerk and Recorder.
By Manton Shepperd,
Deputy.

[Endorsed]: No. 705. In the Circuit Court of the United States, Ninth Circuit, District of Montana. Benjamin Graham et al., Complainants, vs. H. H. Nelson Sheep Co. et al., Defendants. Bill of Complaint. Filed and Entered Apr. 11, 1904, Geo. W. Sproule, Clerk. M. S. Gunn, Solicitor and of Counsel for Complainants.

And thereafter, to wit, on the 11th day of April, A. D. 1904, a subpoena in equity was duly issued herein, which is in the words and figures following, to wit:

UNITED STATES OF AMERICA.

Circuit Court of the United States, Ninth Judicial Circuit, District of Montana.

IN EQUITY.

Subpoena ad Respondendum.

The President of the United States of America, Greeting, to H. H. Nelson, Nelson Sheep Company, a Corporation, H. H. Nelson and James T. Stanford, Defendants.

You are hereby commanded, that you be and appear in said Circuit Court of the United States aforesaid, at the courtroom in Helena, on the 2d day of May, A. D. 1904, to answer a bill of complaint exhibited against you in said court by Benjamin Graham and the American Freehold Land Mortgage Company of London, England, Limited, a corporation, Complainants, who are citizens of the State of New York and the Kingdom of Great Britain and Ireland, respectively, and to do and receive what the said Court shall have considered in that behalf. And this you are not to omit, under the penalty of five thousand dollars.

Witness, the Honorable MELVILLE W. FULLER, Chief Justice of the United States, this 11th day of April, in the year of our Lord one thousand nine hundred and four and of our Independence the 128th.

[Seal] GEO. W. SPROULE,
Clerk.
By ————————,
Deputy Clerk.

Memorandum Pursuant to Rule 12, Superior Court U. S.

You are hereby required to enter your appearance in the above suit, on or before the first Monday of May next, at the clerk's office of said court, pursuant to said bill; otherwise the said bill will be taken pro confesso.

[Seal] GEO. W. SPROULE,
Clerk.
By ————————,
Deputy Clerk.

MILTON S. GUNN,
Solicitor for Complainants, Helena, Montana.

Service of within subpoena admitted and receipt of copy thereof acknowledged in Cascade County, Montana, this 28th day of April, 1904.

H. H. NELSON SHEEP CO.
By H. H. NELSON, Prest.
H. H. NELSON.
JAMES T. STANFORD, May 3, 1904.

[Endorsed]: No. 705. U. S. Circuit Court, Ninth Circuit, District of Montana. In Equity. Benjamin Graham et al. vs. H. H. Nelson Sheep Co. et al. Subpoena. Filed May 5, 1904. Geo. W. Spoule, Clerk.

And thereafter, to wit, on the 14th day of April, A. D. 1904, an order to show cause was issued herein, which said order to show cause is in the words and figures following, to wit:

[Title of Court and Cause.]

Order to Show Cause.

Upon application of the complainants in the above-entitled suit, by their solicitor, M. S. Gunn:

It is ordered that the defendant, H. H. Nelson Sheep Company, its agents, officers and servants, and all other persons, be and they are hereby restrained and enjoined from selling, disposing of, or transferring the possession of any of the property described in the trust deed or mortgage made a part of the bill of complaint in this suit, and recorded in the office of the county clerk and recorder of Cascade County, Montana, in Book 18 of Mortgages, page 249, until the further order of the Court herein; and,

It is further ordered that the defendants herein show cause before the above-entitled court in Helena,

Montana, where said court is held, on the 17th day of May, 1904, at the hour of ten o'clock A. M., or as soon thereafter as a hearing can be had, why a receiver of the property described in the said trust deed, and the rents, issues and profits thereof, should not be appointed as prayed for in the bill of complaint in this suit.

Dated this 14th day of April, A. D. 1904.

HIRAM KNOWLES,
Judge.

Service of the foregoing order accepted and receipt of copy thereof and a copy of the bill of complaint and affidavit of H. B. Palmer are acknowledged this 16th day of April, 1904.

H. H. NELSON SHEEP CO.,
By H. H. NELSON, Prest.
H. H. NELSON.

JAMES T. STANFORD.

[Endorsed]: Title of Court and Cause. Order to Show Cause and Restraining Order. Entered April 14, 1904. Filed May 5, 1904. Geo. W. Sproule, Clerk.

And thereafter, to wit, on the 3d day of September, A. D. 1904, defendants filed their consent to the appointment of a receiver herein, which said consent to appointment of receiver is entered of final record as follows, to wit:

[Title of Court and Cause.]

Consent to Appointment of Receiver.

The defendant, H. H. Nelson Sheep Company, being in the possession of the property described in the trust deed or mortgage made a part of the bill of complaint in the above-entitled suit, hereby consents to the granting of the prayer of said bill of complaint for the appointment of a receiver to take possession of, manage, operate and hold said property during the pendency of this suit, and to receive and collect the rents, issues and profits thereof and hold and dispose of the same subject to the order of said court; and hereby waives notice of the application for such appointment.

Dated this 18th day of April, A. D. 1904.

H. H. NELSON SHEEP COMPANY,
By H. H. NELSON, President.
H. H. NELSON.

[Endorsed]: Title of Court and Cause. Consent to Appointment of Receiver. Filed Sept. 3, 1904. Geo. W. Sproule, Clerk.

And thereafter, to wit, on the 3d day of September, A. D. 1904, an order appointing receiver was entered herein, which said order is entered of final record as follows, to wit:

[Title of Court and Cause.]

Order Appointing Receiver.

Now, on the 3d day of September, 1904, come the complainants in the above-entitled cause, by their solicitor, M. S. Gunn, and apply for the appointment of a receiver as prayed for in the bill of complaint herein, and it appearing that the property described in the trust deed or mortgage made a part of the bill of complaint is in the possession of the defendant H. H. Nelson Sheep Company, and it further appearing that the said sheep company and the defendant H. H. Nelson have consented in writing to the granting of such application, and that the said bill has been taken as confessed by the said last-named defendants; upon consideration of the said bill of complaint and the court having been fully advised in the premises—

It is now hereby ordered, adjudged, and decreed that H. B. Palmer, a suitable person, be and he is hereby appointed receiver of all and singular the said property described in said truth deed or mortgage, together with the income, issues and profits thereof.

And it is further ordered that the said defendant sheep company, its agents, officers, servants, and all other persons be and the same are hereby restrained and enjoined during the pendency of this suit from interfering with, transferring, selling, or disposing

of any of said property, or from taking possession thereof, or from in any way interfering with the same or any part thereof, or from interfering in any manner with the possession or management of any of said property, or from interfering in any manner to prevent the discharge by said receiver of his duties with reference thereto.

Said receiver is hereby authorized to manage said property in such manner as will in his judgment produce the most satisfactory results, and to receive all the rents, issues and income thereof, and hold and dispose of the same subject to the order of this court.

It is further ordered that this order shall become operative upon said receiver furnishing and filing in the office of the clerk of the above-entitled court a good and sufficient bond in the penal sum of five thousand dollars, conditioned for the faithful discharge of the duties of his office as receiver, to be approved by the clerk of said court; and upon taking an oath to faithfully discharge the duties of his said office.

Dated this 3d day of September, A. D. 1904.

WM. H. HUNT,

Judge.

[Endorsed]: Title of Court and Cause. Order Appointing Receiver. Filed and entered Sep. 3, 1904. Geo. W. Sproule, Clerk.

And thereafter, to wit, on the 4th day of February, A. D. 1905, a final decree was duly entered herein, which said final decree is entered of final record as follows, to wit:

[Title of Court and Cause.]

Decree.

This cause coming on to be heard at this term; and thereupon, on consideration thereof, it is ordered, adjuged and decreed as follows, viz:

I. That there is due to the complainant, the American Freehold Land Mortgage Company of London, England, Limited, a corporation, for principal and interest on the indebtedness secured by the trust deed or mortgage mentioned in the bill of complaint herein, the sum of thirty-seven thousand one hundred and 50-100 dollars ($37,100.50) and as costs four per cent of such amount, or the sum of fourteen hundred and eighty-four and 02-100 dollars ($1484.02), as a solicitors' fee, which said item of cost is allowed as provided in and by said trust deed or mortgage, and is reasonable; and also other costs in the case, taxed at the sum of fifty-five and 45-100 ($55.45) dollars.

II. That unless the said sum of thirty-seven thousand one hundred dollars and fifty cents ($37,-100.50) and costs due as aforesaid, with interest on said sum and costs, at the rate of eight per cent per annum from the date hereof, be paid within ten days

from the date hereof, that all and singular the property and premises described in said trust deed or mortgage, and hereinafter described, be sold by the officer of this court hereinafter appointed and designated to make such sale.

III. That said property be sold as an entirety, it appearing that said mortgage or trust deed provides for a sale in parcels or all together, and that the same will not probably sell for sufficient to pay and satisfy the costs and expenses of such sale, and other costs due the complainant, the American Freehold Land Mortgage Company of London, England, Limited, and the amount of the principal and interest as aforesaid, and also that the said property constitutes a single ranch or farm, and will sell to better advantage and for a better price as a whole than it would if divided and sold in parcels.

IV. That said sale be made at the front door of the courthouse in the city of Great Falls, County of Cascade, Montana, the county in which said property is situated, at public auction, after giving notice as hereinafter ordered and directed, to the highest and best bidder for cash; provided, that if the complainant, the American Freehold Land Mortgage Company of London, England, Limited, bids for said property, and its bid is accepted, it may, after paying to the officer making such sale, his compensation and commissions, as the same may be fixed and allowed by the court, and other costs and expenses in-

cident to, and incurred in, making said sale, satisfy and pay the balance of such bid by executing and delivering to said officer a proper instrument in writing, acknowledging the payment of the amount then due hereunder, to the extent of such balance, and if the said balance shall be in excess of the costs and expenses of said sale, and the amount then due the complainant, the American Freehold Land Mortgage Company of London, England, Limited, hereunder, in excess or difference shall be paid to said officer, in cash, to be disposed of as hereinafter provided.

V. The said sale shall take place between the hours of nine o'clock A. M. and five o'clock P. M. on the day designated by said officer and notice of sale, stating the time and place thereof, the authority for making the same, and containing a description of the property to be sold, signed by the officer hereinafter designated and appointed, shall be published in a newspaper of general circulation in the county of Cascade, once a week for four consecutive weeks, and the first publication shall be at least thirty days before the date fixed for said sale.

VI. That the officer making said sale shall execute, acknowledge and deliver to the purchaser a certificate, reciting that said sale was made pursuant to the authority conferred by this decree describing the property purchased by him, showing the amount paid therefor, and that such purchaser will be en-

titled to a deed of the property so purchased, on the expiration of one year from the date of said sale, unless said property shall have been duly redeemed.

VII. That if there is no redemption from such sale by a person entitled to redeem within one year from the date of said sale, the officer making the same, or in the event of his death or inability, for any reason, to act, some other officer designated and appointed by this court, shall execute, acknowledge and deliver to the purchaser, or the person then lawfully holding said certificate of sale, upon the surrender of said certificate, a deed of conveyance of said property, and the whole thereof, and thereupon the defendants H. H. Nelson Sheep Company and James T. Stanford, and all persons who may have acquired any interest in or to said property, or any part thereof from the said defendants or either of them, or any lien or encumbrance thereon, subsequent to the filing of the bill of complaint in this cause, and the issuance of the subpoena, directed to said defendants, shall stand debarred and foreclosed of and from all right, title and interest, and from all equity of redemption in and to the said premises and property, and every part thereof.

VIII. That the said officer making said sale shall apply the proceeds realized therefrom, as follows:

1. To the payment of his compensation and commission, and the other costs and expenses incurred in connection with said sale.

2. To the payment of the amount due the complainant the American Freehold Land Mortgage Company of London, England, Limited, as hereinbefore determined, with interest thereon from the date hereof at the rate of eight per cent per annum.

3. Any balance to be paid to the clerk of said court, to be held subject to the order of the court.

(8-½.) That the said officer shall report the said sale to the court within ten days from the date of making said sale, unless the time for filing said report shall be extended by the Court, which report shall be confirmed as a matter of course, unless objections to said sale are filed within twenty days after said report is presented and filed.

IX. That Oliver T. Crane, the master in chancery of this court, be, and he is hereby, designated and appointed as the officer of this court to make said sale, and is hereby authorized and directed to exercise the powers conferred, and perform the duties imposed upon him by this court.

X. That the receiver heretofore appointed to take possession, care for and manage said property and premises, continue to act as such receiver, with the powers heretofore granted him by this court, until the further order of this court, and that any money or funds in his possession as receiver at the time of his discharge, and after his accounts shall have been settled and allowed to be paid into the

clerk of this court, to be held subject to the order of this court.

XII. That after the application of the proceeds of such sale as hereinbefore ordered and directed, if there is any balance due the complainant the American Freehold Land Mortgage Company of London, England, Limited, a further decree be rendered against the defendants H. H. Nelson Sheep Company and H. H. Nelson for such balance, and providing that execution may issue for the collection of the same.

XII. The property and premises described in the said trust deed or mortgage, and made a part of the bill of complaint, herein, and hereby directed to be sold, are described as follows, to wit:

[Description of lands as in Bill of Complaint, omitted under stipulation of parties.]

Together with all and singular the tenements, improvements, hereditaments, appurtenances, easements, water rights, and all other rights belonging to or in any wise appertaining thereto.

XIII. The Court expressly reserves and retains jurisdiction of all matters pertaining to the said receivership, until the receiver shall be finally discharged, and also to make such amendments thereto, and such further orders and decrees as are necessary to equity and good conscience, and to fully and completely dispose of this cause.

Done in open court this 4th day of February, A. D. 1905.

WILLIAM H. HUNT,
Judge.

[Endorsed]: Title of Court and Cause. Decree. Filed and Entered Feb. 4, 1905. Geo. W. Sproule, Clerk.

And thereafter to wit, on the 24th day of October, A. D. 1904, Herbert Strain filed herein his petition pro interesse suo, which said petition is in the words and figures as follows, to wit:

[Title of Court and Cause.]

Petition of Herbert Strain pro interesse suo.

To the Honorable, the Circuit Court of the United States, In Equity Sitting Within the District of Montana, and to Its Judges:

Comes now Herbert Strain, and by this, his petition pro interesse suo, respectfully shows and humbly gives the Court to understand and be informed—

That petitioner is a citizen of the State of Montana, residing at the city of Great Falls, in the county of Cascade, Montana, and that at all the times hereinafter mentioned he was, for many years last past has been, and now is, engaged in the business of trading and buying and selling goods, wares and merchandise by wholesale and at retail under the name and style of "Strain Brothers."

That on the 17th day of August, 1904, at said county of Cascade, he purchased for full and adequate consideration, and for value, of defendant H. H. Nelson Sheep Company all the oats and oat crop then on the ranch known as the Riverdale Stock Farm, situate near Cascade, in said county, and all the hay then cut and stacked and thereafter to cut and stacked on said Farm and lands connected therewith, except such shares as might belong to one Hugh Jones and one Fred. Nicholson; that said company was then the owner of said hay and oats, and that for full consideration paid by petitioner to said company therefor said company did then and there bargain, sell, assign, transfer and set over to petitioner, and immediately deliver to him, the said hay and oats so purchased by him; that by said sale and delivery petitioner became and ever since has been the owner thereof, to wit, of eighty tons of hay and 820 bushels of oats, and that he remained in possession of the same until he was wrongfully and unlawfully dispossessed thereof as hereinafter stated, and that he paid the expenses of harvesting and putting up said hay and grain; that a true copy of the memorandum or bill of said sale is the following:

"For value received, the undersigned, H. H. Nelson Sheep Co., a corporation, does hereby sell, assign and transfer to Strain Bros., copartners, doing business in Great Falls, Cascade County, Montana, all the grain and also all the hay cut and stacked, and

hereafter to be cut and stacked, on all the hay land connected with the Riverdale Stock Farm, near Cascade, in the County of Cascade and state of Montana, being two hundred fifty (250) tons more or less, except such share hay as belonged to Hugh Jones and Fred Nicholson. All of said hay and grain are this day delivered to said Strain Bros., who will hereafter have entire charge and possession of the same. The hay already cut and stacked is to be measured in the usual way at once, and the balance is to be measured in the usual way as soon as stacked.

Dated this 17th day of August, 1904.

(Signed) H. H. NELSON SHEEP CO.,
By H. H. NELSON, Prest.,
President and Manager.

That petitioner had no information, knowledge or notice of the order restraining said company from selling or disposing of any of the issues or profits of said farm, until long after the said purchase by him, and that at the time he so purchased the said property and the land on which it was situate were in the actual and open possession of said company as owner, and that neither of the plaintiffs has, or ever has had, as petitioner is informed and believes, any lien or mortgage on said oats and hay, and that if there be such mortgage or lien petitioner has no notice or knowledge thereof, and it has never been of record.

That thereafter, and on or about the third day of September, 1904, and while petitioner was the owner and in possession of said chattels so purchased by him, H. B. Palmer was appointed receiver of the property of said company, and ever since has been, and now is, such receiver; that on or about the fourth day of the same month, and while petitioner was so the owner, and in possession and thereto entitled, said receiver wrongfully and unlawfully and without petitioner's consent, took from the possession of petitioner said hay and oats, to wit, 80 tons of hay of the reasonable value of $560, and 820 bushels, or 32,800 pounds, of oats reasonably worth $328.

Your petitioner further respectfully represents and unto the Court humbly shows, that he has repeatedly notified the said receiver of the right and title of petitioner to said chattels, and has both orally and by sworn demand required said receiver to surrender and deliver and return the said chattels to petitioner, but that the receiver has ever failed and refused to comply therewith or to surrender or return said property or any part thereof or to pay to petitioner its value or the proceeds or any thereof; that (as petitioner is informed and believes and therefore so charges) said receiver yet holds and detains and retains said property under the claim and pretense that the same is the property of said company; that if the receiver has sold or otherwise disposed of the said chattels, or any part of them, he

did so unlawfully and wrongfully, and is answerable for their value and proceeds.

That on the sixth day of October, 1904, the receiver filed in the office of the clerk of this Honorable Court a petition for leave to sell said chattels, but that said petition has not been presented.

All of which acts and doings of said receiver are, as petitioner is advised, contrary to equity and good conscience and tend to the manifest wrong, injury and oppression of your petitioner in the premises:

In tender consideration whereof, and forasmuch as your petitioner is without remedy in any other court and is relievable only in this court and cause where alone the wrong done (as well as the injury threatened) may be remedied (or prevented), your petitioner prays, that upon consideration of this, his petition, it may please the Court and your Honors to order the examination of petitioner pro interesse suo upon interrogatories to be exhibited against him by the said receiver or the plaintiff, or both, or else to order the testimony of all the witnesses produced to be taken orally by an examiner and filed, or to order the whole of the evidence to be adduced orally in open court at the hearing; and your petitioner respectfully prays, the premises considered, that the receiver be ordered and required to surrender and return to petitioner the said chattels, or, if the same shall have sold or disposed of by him, that he pay to petitioner the value thereof; that the petition of

the receiver for leave to sell said chattels be denied; that petitioner have judgment or order for the payment of his costs in this behalf most wrongfully sustained; and for such other and further or other and different relief as may be meet and equitable.

HERBERT STRAIN,
W. T. PIGOTT,
Counsel for Strain.

A. C. GORMLEY,
Great Falls, Montana,
W. T. PIGOTT,
Helena, Montana,
Solicitors for Petitioner.

State of Montana,
County of Cascade,—ss.

Herbert Strain, being duly sworn, deposes, that the matters and things stated in the foregoing petition are true as he verily believes.

HERBERT STRAIN.

Sworn to and subscribed before me, this October 22, 1904.

[Notarial Seal] H. R. AYER,
A Notary Public in and for the County of Cascade, Montana.

Personal service of the foregoing petition, together with a notice that it will be filed and presented to the Court at the hour of ten o'clock, A. M., on the 9th day of November, 1904, or as soon thereafter as counsel

may be heard, is hereby admitted, this October 24, 1904.

M. S. GUNN,

Solicitor and Counsel for Plaintiffs and Receiver.

[Endorsed]: Title of Court and Cause. Petition of Herbert Strain pro interesse suo. Filed Oct. 24, 1904. Geo. W. Sproule, Clerk.

And thereafter, to wit, on the 9th day of November, A. D. 1904, an order requiring the receiver to answer the petition pro interesse suo was made and entered herein, said order being in words and figures as follows, to wit:

[Title of Court and Cause.]

Order Requiring Receiver to Answer Petition pro interesse suo.

In the Matter of the Petition of HERBERT STRAIN pro interesse suo.

Upon the filing and presentation of the petition for examination pro interesse suo of Herbert Strain,

It is hereby ordered, that H. B. Palmer, the receiver of the property and estate of the defendant H. H. Nelson Sheep Company, make, file, and serve upon counsel for said Strain, on or before the 21st day of November, 1904, his answer or response to

the said petition, showing cause, if any he have, why the prayer of said petition should not be granted.

It is further ordered that a copy of this order be served upon said Receiver or his counsel on or before the 15th day of November, 1904.

WM. H. HUNT,
Judge of said District Court.

Due service of the foregoing order is hereby admitted this November 9th, 1904.

M. S. GUNN,
Solicitor and of Counsel for Receiver.

[Endorsed]: Title of Court and Cause. Order Requiring Receiver to Answer Petition of Strain pro interesse suo. Filed and entered Nov. 9th, 1904. Geo. W. Sproule, Clerk.

And thereafter, to wit, on the 4th day of April, A. D. 1905, the master in chancery filed his report of sale herein, which said report of sale is in the words and figures following, to wit:

[Title of Court and Cause.]

Report of Sale of Master in Chancery.

To the Honorable Judges of the Circuit Court of the United States, for the District of Montana, Ninth Circuit, in Equity.

In pursuance and by virtue of a decree of the court, Honorable William H. Hunt, Judge, made in the above-entitled cause, and bearing date the fourth

(4) day of February, A. D. 1905, in and by which decree it was, among other things, considered, adjudged, ordered and decreed that all of said mortgaged property in said decree mentioned and referred to, should be sold by Oliver T. Crane, Esquire, the mastery in chancery of this court, as an entirety and as one property, and not in separate parcels, and in the manner therein directed, to satisfy the amounts due, and to become due as in said decree stated, for principal and interest upon the indebtedness secured by the trust deed or mortgage mentioned in the bill of complaint herein, and the several sums therein allowed and decreed to be paid.

I, the subscriber, as said United States master in chancery of said court, residing at the city of Helena, Lewis and Clark County, within said District and State of Montana, who was by said court so ordered to make sale of said property in said decree mentioned, set forth and described and in the manner therein directed, do respectfully certify and report.

1. That I gave notice of sale and advertised all and singular the said mortgaged property and premises in said decree and hereinafter more specifically described, mentioned, referred to and contained, at and in front of the front door of the courthouse in the city of Great Falls, Cascade County, within said District and State of Montana, on Friday, the thirty-first day of March, A. D. 1905, at the hour of eleven

o'clock forenoon of that day, as an entirety and as one property, and not in separate parcels, and upon the terms and conditions of sale as in said decree and in said advertisement in said notice of sale set forth for four weeks successively, as follows, viz.: by causing a true and correct copy of such notice to be printed once in each week—that is to say, on Monday of each and every of said four weeks successively, immediately prior to and preceding said sale, in the "Tribune," a daily newspaper published at the city of Great Falls, in Cascade County, State of Montana, within said District, and of general circulation in said Cascade County, which said notice contained a statement of the time and place of sale, the authority for making the same, and a description describing the mortgaged property and premises to be sold, signed by the subscriber, the officer designated and appointed, in said decree, to make said sale; as appears in the affidavit of J. Benn hereto attached, marked Exhibit "A."

2. That on said thirty-first day of March, A. D. 1905, the day on which the said premises were so advertised to be sold, as aforesaid, I, as said master, in person attended at the time and place fixed for said sale, and exposed said property and premises for sale, at public auction, to the highest bidder, upon the terms and conditions in said decree and in said notice stated, and according to the rules and practice of this court; and the said property and premises

were then and there by me, as such master, fairly struck off to Benjamin Graham, trustee, at and for the sum of thirty-nine thousand, three hundred and eleven dollars, and forty-eight cents ($39,311.48), the said Benjamin Graham, trustee, being the highest, best bidder, therefor, and that being the highest, best sum bidden for the same.

3. That in accordance with the directions contained in said decree, I, as said master, have executed, acknowledged, and delivered to said purchaser a master's certificate of purchase of said property and premises, reciting therein that said sale was made pursuant to the authority conferred by said decree, describing the property purchased by him, showing the amount paid therefor, and that such purchaser will be entitled to a deed of the property so purchased, on the expiration of one year from the date of said sale, unless said property shall have been duly redeemed, a true and correct copy of which certificate is hereto attached, marked Exhibit "B."

4. That the amount realized from the sale of said premises was, in the aggregate, the sum of thirty-nine thousand three hundred and eleven dollars and forty-eight cents ($39,311.48).

Of such aggregate sum I have credited and disbursed and retained as follows:

Allowed complainants on account of principal amount due on decree.....$37,100.50

Allowed complainants on account of solicitor's fees allowed in decree	1,484.02
Allowed complainants on account taxed costs allowed in decree	55.45
Allowed complainants on account interest at 8 per cent on above sum (from date of decree to date of sale)	374.51
	$39,014.48
Retained on account of advertising sale	$30.00
Retained on account of master's expenses to Great Falls	12.00
Retained on account of typewriting report	$5.00
Retained on account of commissions on sale	250.00
	$297.00
	$39,311.48

The written acknowledgment of the receipt of the amount so credited and disbursed to complainants, duly executed by the solicitor of complainants, is hereto attached to this report marked Exhibit "C."

All of which is respectfully submitted.

Dated this fourth day of April, A. D. 1905.

OLIVER T. CRANE,

Master in Chancery of the Circuit Court of the United States for the District of Montana, and the officer designated and appointed to make said sale.

[Affidavit of publication of notice of sale omitted under stipulation.]

Exhibit "B."

[Title of Court and Cause.]

Master's Certificate of Sale.

I, Oliver T. Crane, master in chancery of the Circuit Court of the United States, District of Montana, do hereby certify that in pursuance and by virtue of a decree of this court, Honorable William H. Hunt, Judge, made in the above-entitled cause, and bearing date the fourth day of February, A. D. 1905, I duly advertised according to law and said decree the premises hereinafter described, to be sold at public vendue, to the highest, best bidder for cash, at the hour of eleven o'clock in the forenoon, on Friday, the thirty-first day of March, A. D. 1905, at the front door of the courthouse in the city of Great Falls, in Cascade County, State of Montana, within said district. That at the time and place so as aforesaid appointed for said sale, I attended to make the same, and offered and exposed said premises for sale at public vendue to the highest and best bidder for cash; whereupon, Benjamin Graham, trustee, offered and bid therefor the sum of thirty-nine thousand three hundred and eleven dollars and forty-eight cents ($39,311.48), and that being the highest and best bid offered therefor, I accordingly struck off and sold to said bidder for said sum of money the said premises mentioned and described in said decree,

which are situate in the county of Cascade, and State of Montana, and are described as follows, to wit:

[Description of lands as in Complaint and Decree omitted under Stipulation.]

Together with all and singular the tenements, improvements, hereditaments, appurtenances, easements, water rights and all other rights belonging to or in any wise appertaining thereto.

And I further certify that unless said premises shall be redeemed from said sale within one year from the date hereof, according to law, the said Benjamin Graham, trustee, his legal representatives or assigns, will, on the first day of April, A. D. 1906, be entitled to a deed of the property so purchased by said Benjamin Graham, trustee.

Witness my hand and seal this first day of April, A. D. 1905.

[Seal] OLIVER T. CRANE,

Master in Chancery of the Circuit Court of the United States, in and for the District of Montana, and the officer designated and appointed by said decree to make said sale.

Exhibit "C."

$39,014.48. Helena, Montana, April 1, 1905.

Received from Oliver T. Crane, master in chancery of the United States Circuit Court, Ninth Circuit, District of Montana, the sum of thirty-nine thousand and fourteen dollars and forty-eight cents ($39,014.-

48) for principal debt, interest, solicitor's fees and taxed costs under the decree in the cause entitled Benjamin Graham, Trustee, et al., Complainants, versus the H. H. Nelson Sheep Company, et al., Defendants, which said decree was rendered and entered in the United States Circuit Court for the District of Montana, on the fourth day of February, A. D. 1905.

M. S.GUNN,
Solicitor for Complainants.

[Endorsed]: Title of Court and Cause. Report of Sale of Property by O. T. Crane, Master in Chancery. Filed and entered April 4, 1905. Geo. W. Sproule, Clerk.

And thereafter, to wit, on the 12th day of June, 1905, an agreed statement of facts was filed herein, being in the words and figures following, to wit:

[Title of Court and Cause.]

Statement of Facts Agreed Upon by Herbert Strain, Petitioner, and H. B. Palmer, Receiver.

Come now Herbert Strain, petitioner, and H. B. Palmer, receiver, and hereby stipulate and agree (for the purpose of this proceeding only) upon the following as the facts upon which the petition of said Strain pro interesse suo shall be heard and determined, to wit:

1. Said Herbert Strain at all the times herein mentioned was, and now is, engaged in the business of trading and buying and selling goods, wares and merchandise by wholesale and at retail under the name and style of Strain Brothers.

2. On the 11th day of April, 1904, the complainants filed in the office of the clerk of this court their bill of complaint for the foreclosure of a certain mortgage or trust deed, a copy of which is made a part of said bill. Said bill of complaint is hereby referred to and made a part of this stipulation to the same extent and with like effect as if herein set forth in haec verba. On April 28, 1904, a writ of subpoena issued pursuant to the prayer of said bill of complaint was duly and regularly served upon the said defendants, H. H. Nelson Sheep Company and H. H. Nelson, and a decree pro confesso was entered against both said named defendants.

3. On April 14, 1904, the then Judge of this court made the following order in said cause:

Upon the application of the complainants in the above-entitled suit, by their solicitor, M. S. Gunn—

It is ordered that the defendant H. H. Nelson Sheep Company, its agents, officers and servants, and all other persons, be and they are hereby restrained and enjoined from selling, disposing of or transferring the possession of any of their property described in the trust deed or mortgage made a part of the bill of complaint in this suit, and recorded in

the office of the county clerk and recorder of Cascade County, Montana, in Book 18 of Mortgages, page 249, until the further order of the court herein; and

It is further ordered that the defendants herein show cause before the above-entitled court in Helena, Montana, where said court is held, on the 17th day of May, 1904, at the hour of ten o'clock A. M., or as soon thereafter as a hearing can be had, why a receiver of the property described in said trust deed, and the rents, issues and profits thereof, should not be appointed as prayed for in the said bill of complaint in this suit.

Dated this 14th day of April, A. D. 1904.

(Signed) HIRAM KNOWLES,
Judge.

Said Strain had actual notice that said suit had been commenced to foreclose said trust deed or mortgage before the purchase by him of the property involved in this controversy, but had no notice or knowledge of said order above quoted or that complainants had prayed for an order enjoining the defendant company from disposing of any of the income, rents, issues or profits of the real estate described in said mortgage or trust deed until after the purchase by him hereinafter referred to unless it be held that he was charged with constructive notice of said order and the prayer of said bill by reason of the doctrine of lis pendens nor did said Strain have any actual knowledge or actual notice that said mort-

gage or deed of trust purported to cover or impose a lien upon the rents, issues, profits and proceeds of said real estate. Said order was duly served upon the defendant sheep company on April 16 and upon the defendant H. H. Nelson on May 3, 1904.

4. The trust deed or mortgage hereinbefore mentioned was not, and is not, accompanied by the affidavit required by sections 3849 and 3861 of the Civil Code, or any affidavit whatever; it was, on March 28, 1901, recorded in the office of the recorder of Cascade County, Montana, the county wherein all the real estate described in said mortgage is situated, in Book 18 of Mortgages, at page 249.

5. The defendant sheep company remained in the actual and exclusive possession, custody and control of all of said real property mortgaged from the date of the mortgage until the 4th day of September, 1904, when the receiver entered into the possession thereof; and the hay and oats in controversy were grown upon the mortgaged premises, but were never at any time delivered to, or in the possession of, the complainants or either of them, but were and remained at all times in the actual possession of the defendant company, until August 17, 1904.

6. On August 17, 1904, and at the time of the sale to Strain, said hay and oats had ceased to derive nutriment from the soil, were ripe, mature and ready for the harvest and a part thereof had been cut down, and all thereof was in the actual possession of the

defendant company; on said day defendant company was indebted to said Strain in a sum exceeding the value of said chattels, upon an express contract for the direct payment of money, to wit, upon a promise to pay Strain the price of goods, wares and merchandise, theretofore sold and delivered by him to said company, which debt was then past due and wholly unpaid, and the payment of said debt had not been, and was not at any time secured, either in whole or in part, by any mortgage, lien or pledge whatsoever. On said day and while the company was so in the possession, and while said Strain was without any knowledge, notice or information that complainants asserted any lien upon said hay and oats, unless he was charged with notice thereof by reason of the pendency of said suit and the issuance of the order hereinbefore set forth, said Strain bought of the company and the company sold to him the said hay and oats.

7. Said sale was made in payment and discharge of said antecedent and existing indebtedness and was evidenced by an instrument in writing, which is set forth in and made a part of the petition of the said Strain heretofore filed in this matter. That said Strain paid for harvesting and caring for said hay and grain the sum of $157.00; that immediately after said sale the company delivered the actual possession of said chattels to said Strain, who continually kept and maintained such possession until September 4,

1904, when said receiver, appointed on September 3d, 1904, by an order of said court, to which reference is hereby made and a copy of which is hereto attached and made a part hereof, without the consent and against the protest of said Strain took possession of said property; that said Strain, between September 5th and October 19th, 1904, repeatedly demanded of said receiver the possession of said hay and oats, and on October 19th served upon said receiver a written demand that said receiver surrender and deliver possession of said chattels to him, but that said receiver has refused to comply therewith and yet holds and retains the possession of said chattels except such part thereof as has been sold by him; that said receiver has sold 30,256 pounds of said oats at $1.30 per hundred, or the sum of $393.32; 5½ tons of hay at $9.00 per ton, $49.50; 10 tons of straw at $4.00 per ton, $40.00, making the total of said sales the sum of $482.82; that said receiver has expended for threshing $39.70 for 310 bags and twine $25.05, hauling oats $28.00, for haying and harvesting $154.00, making a total of $233.37; that the said receiver now has in his possession approximately 24 tons of said hay, and 27 tons of said grain hay and 15 tons of said straw, the value of all of said hay and straw in said receivers possession to be fixed and determined by the court or judge in the event petitioner prevails herein.

8. That long prior to the month of August, 1904, and on the 18th day of April, 1904, the defendants H. H. Nelson Sheep Company and H. H. Nelson consented in writing to the appointment of a receiver to take possession of, manage, operate and hold the property described in the trust deed or mortgage, made a part of said bill of complaint, during the pendency of said suit and to receive and collect the rents, issues and profits thereof and hold and dispose of the same subject to the order of said court; that Strain had no knowledge or notice of said consent or agreement; that the reason for the delay in appointing a receiver in said suit was because of the fact that the Honorable Hiram Knowles, the United States District Judge for Montana, resigned his position in office and ceased to perform any of the duties or functions of said office on the 13th day of April, 1904, and the Honorable William H. Hunt, appointed to succeed the said Knowles as District Judge, did not assume the duties of his office until the 1st day of September, 1904, and that during said interval there was no judge of said court to whom application for the appointment of a receiver could be made.

Respectfully submitted.

A. C. GORMLEY,
W. T. PIGOTT,
Solicitors for Petitioner.
M. S. GUNN,
Solicitor for H. B. Palmer, Receiver.

[Endorsed]: Title of Court and Cause. Agreed Statement of Facts. Filed and entered June 12, 1905. Geo. W. Sproule, Clerk.

And thereafter, to wit, on the 26th day of February, A. D. 1906, an order denying the petition pro interesse suo of Herbert Strain was duly made and entered herein, being in the words and figures following, to wit:

[Title of Court and Cause.]

Order Denying Petition pro interesse suo.

This matter heretofore submitted to the Court upon petition of Herbert Strain pro interesse suo, came on regularly at this time for the judgment and decision of the court, and after due consideration, it is ordered that said petition be and the same hereby is denied.

GEO. W. SPROULE,
Clerk.

Attest a true copy of minute entry of February 26, 1906.

[Seal] GEO. W. SPROULE,
Clerk.
By C. R. Garlow,
Deputy Clerk.

And thereafter, to wit, on the 21st day of April, A. D. 1906, the receiver filed his report and account herein, being in the words and figures following, to wit:

[Title of Court and Cause.]

Report of H. B. Palmer, Receiver.

H. B. Palmer respectfully represents and shows unto this Honorable Court:

That he was appointed receiver by an order duly made and entered in the above-entitled cause on the 3d day of September, 1904; that in compliance with the requirements of said order he furnished and filed in the office of the clerk of the above-entitled court, a good and sufficient bond in the penal sum of $5,000.00, conditioned for the faithful discharge of the duties of his office as receiver, which bond was approved by the clerk of said court, and took oath to faithfully discharge the duties of said office; that pursuant to the authority conferred by said order appointing him receiver as aforesaid, he did, on or about the 3d day of September, 1904, enter into the full and complete possession of the real estate described in the bill of complaint in said cause, and also took possession of the crops of hay and grain produced by said real estate and then situate thereon.

That he has received as rent for said real estate and from the sale of the hay and grain grown thereon the sum of $1403.82, and has expended in the case, protection and management of said property and in

the payment of the taxes against the same for the years 1904 and 1905, the sum of $1122.93; that there is attached hereto a statement of his account as receiver, showing in detail the receipts and expenditures aforesaid that M. S. Gunn has presented him with a claim for attorney's fees for services performed as his solicitor and attorney, amounting to the sum of one hundred and fifty dollars, which claim is reasonable and just; that the sum of five hundred dollars is reasonable compensation for his services as receiver; that the real estate over which he was appointed receiver as aforesaid was sold pursuant to a decree rendered and entered in the above-entitled cause on the 30th day of March, 1905, by the master in chancery of said court to one Benjamin Graham, as trustee, and a certificate of sale issued to such purchaser; that there having been no redemption of said property from said sale the said master in chancery, after the expiration of one year from the date of said sale, executed, acknowledged and delivered to said purchaser a proper deed of conveyance of said property.

Wherefore, your receiver prays that an order be made and entered fixing the time for the hearing of this report and account, directing that notice thereof be given to all parties interested for such time and in such manner as the court shall deem proper, and that upon the hearing of such report and account an order be made approving the claim presented by M.

S. Gunn and directing payment thereof, fixing the amount of your receiver's compensation in the sum of five hundred dollars, approving said account, and directing the delivery or the possession of said property to Benjamin Graham, trustee, the purchaser at said sale, and releasing the bond of your receiver and discharging the sureties thereon.

H. B. PALMER,
Receiver.

M. S. GUNN,
Solicitor for Receiver.

[Duly verified.]

Subscribed and sworn to before me this 17th day of April, 1906.

[Seal] T. A. MAPES,
Notary Public in and for Lewis and Clark County, Montana.

STATEMENT OF RECEIPTS AND DISBURSEMENTS.

As shown by H. B. Palmer, Receiver of the H. H. Nelson Sheep Company from the date of his Appointment to April 12, 1906.

1904.

Sep.	7.	Insurance	$ 70.25
		Trip to ranch	17.15
	15.	H. M. Jones, acct. haying	25.00
	17.	Trip to ranch	9.85
	24.	Jones, haying	31.60

	29.	Trip to ranch	10.00
	30.	Eder Bros., thresh'g	6.00
Oct.	3.	Trip to ranch	2.05
	8.	Livery, Cascade	6.00
	12.	Trip to ranch	9.95
		Eder, threshing	15.25
		Trip to ranch	15.00
		Board 2 men 3 days	4.50
	22.	Jones, haying	34.00
		Trip to ranch	2.30
	31.	Jones, labor	17.50
Nov.	7.	Jones, haying	40.00
		Jones, haying	40.00
		Jones, fencing	9.00
	9.	Jones, hauling oats	17.50
	7.	Trip to ranch	11.90
		Nicholson hlg. oats	19.55
	14.	Taxes	297.58
Dec.	10.	Store bill, Marcum	11.35
	21.	Repairing fence	13.00
	6.	Fee for bond	22.50
1905.			
Jan.	5.	Trip to ranch	21.05
	10.	Livery, Cascade	5.00
	17.	Livery, Cascade	1.50
	21.	Trip to ranch	7.60
	27.	Livery, Cascade	5.00
Feb.	15.	Nicholson, Custodian	12.75

Mar.	15.	Nicholson, Custodian	35.00
	31.	Trip to ranch	20.30
		Nicholson, Custodian	35.00
Apr.	21.	Trip to ranch	23.65
	25.	Livery, Cascade	6.00
May	1.	Trip to ranch	10.15
	3.	Nicholson, Custodian	25.55
	11.	Insurance	70.25
Jul.	26.	Trip to ranch	12.15
Aug.	15.	Trip to ranch	13.40
Oct.	24.	Premium on bond	11.25
Nov.	14.	Trip to ranch	8.65
Dec.	8.	Livery, Cascade	3.00
1906.			
Mar.	31.	Insurance	36.50
		Balance	280.99
			$1,403.82

1904.			
Oct.	14.	Marcum lease	$ 65.00
	24.	Sale of oats	393.34
		Jones lease	33.33
Nov.	7.	Nicholson lease	100.00
		Sale of hay	19.55
Dec.	3.	Nicholson lease	25.00
	15.	Nicholson lease	20.00
1905.			
Feb.	25.	Nicholson lease	100.00
May	6.	Marcum lease	65.00

June	20.	Rent pasture	84.00
Oct.	2.	Rent, Kerr	150.00
	12.	Rent, pasture	3.50
Nov.	16.	Rent pasture	10.00
		Rent pasture	10.00
1906.			
Jan.	4.	Lease, acct. rent	36.60
	13.	Marcum, rent	65.00
	30.	Sale of hay	83.20
Feb.	26.	Lease, balance rent	10.30
Mar.	17.	Sale of hay	40.00
	31.	Sale of hay	90.00
			$1,403.82

[Endorsed]: Title of Court and Cause. Report and Account. Filed April 21, 1906. Geo. W. Sproule, Clerk.

And thereafter, to wit, on the 5th day of May, A. D. 1906, the objections of Herbert Strain to the receiver's report were filed herein, being in the words and figures following, to wit:

[Title of Court and Cause.]

Objections of Herbert Strain to Receiver's Report.

Comes now Herbert Strain and makes and files herein the following objections to the report and account of the Receiver H. B. Palmer, to wit:

The said Herbert Strain objects to the allowance and approval of the said receiver's report and ac-

count as presented and asks that the court, in its order passing upon said report and account, require and direct the said receiver to deliver to the undersigned certain personal property, which the said receiver took into his possession on the 4th day of September, 1904, to wit,eighty (80) tons of hay of the reasonable value of $560.00, and eight hundred and twenty (820) bushels or thirty-two thousand eight hundred (32,800) pounds of oats at the reasonable value of $328.00, or in the event that said receiver has disposed of any of said hay and oats that he pay to the undersigned the value thereof with interest from said 4th day of September, 1904.

These objections are based upon the fact, as shown in the said receiver's report, that at the sale of the said real estate, in pursuance of the decree of this court, the complainants herein purchased all of said real estate for a sum sufficient to cover their mortgage indebtedness, interest and costs, so that the said mortgage thereby became satisfied in full without recourse to the said hay and oats, which had theretofore, to wit, on the 17th day of August, 1904, been purchased by the undersigned, as fully appears from his petition and the agreed statement of facts on file herein.

Respectfully submitted,

HERBERT STRAIN.

W. T. PIGOTT,

A. C. GORMLEY,

Counsel for said Herbert Strain.

[Endorsed]: Title of Court and Cause. Objections of Herbert Strain to Receiver's Report. Filed May 5, 1906. Geo. W. Sproule, Clerk.

And thereafter, to wit, on the 28th day of May, A. D. 1906, an order approving receiver's account, overruling objections thereto, etc., was duly made and entered herein, being in the words and figures following, to wit:

[Title of Court and Cause.]

Order Approving Receiver's Account and Overruling Objections Thereto, etc.

The report and account of H. B. Palmer, receiver, having come on regularly for hearing, and the court having duly considered the same and the objections thereto, it is ordered:

1. That such objections be and the same are hereby overruled.

2. That said account be and the same is hereby approved and allowed as correct.

3. That the compensation of said receiver be and the same is hereby fixed at the sum of five hundred dollars.

4. That the claim of M. S. Gunn, as solicitor and counsel for said receiver for services performed, amounting to the sum of $150.00, be and the same is hereby approved, and the receiver is authorized and directed to pay the same.

5. That the balance of the money remaining in the hands of the receiver, after payment of the claim of his solicitor and counsel, be applied on the compensation hereby allowed said receiver.

6. That the receiver deliver possession of the real estate purchased by Benjamin Graham, trustee, at the sale thereof, pursuant to the decree rendered and entered in the above-entitled cause, to the said Benjamin Graham, trustee.

Done in open court this 28th day of May, 1906.

WILLIAM H. HUNT,

Judge.

[Endorsed]: Title of Court and Cause. Order Approving Receiver's Account, Overruling Objections Thereto, etc. Filed and entered May 28th, 1906. Geo. W. Sproule, Clerk.

And thereafter, to wit, on the 31st day of May, A. D. 1906, an order amending said order of May 28, 1906, and denying the petition of Herbert Strain and dismissing his proceeding, was duly made and entered herein, being in the words and figures following, to wit:

[Title of Court and Cause.]

Order Amending Order of May 28, 1906, etc.

It is ordered that the order made in this cause May 28, 1906, be amended as follows:

"It is further ordered, adjudged and decreed that the petition pro interesse suo of Herbert Strain in this suit be, and is hereby denied and refused, and that the proceeding by way of said petition be, and is hereby finally dismissed."

This amendment to said order being entered nunc pro tunc as of May 28, 1906.

GEO. W. SPROULE,
Clerk.

Attest a true copy of minute entry of May 31, 1906.

[Seal] GEO. W. SPROULE,
Clerk.
By C. R. Garlow,
Deputy Clerk.

And thereafter, to wit, on the 7th day of August, A. D. 1906, petition for allowance of appeal and order granting same and fixing bond were filed and entered herein, being in the words and figures following, to wit:

[Title of Court and Cause.]

Petition for Allowance of Appeal and Order Granting Same.

Herbert Strain, the above-named petitioner pro interesse suo, conceiving himself aggrieved by the order and decree made and entered in the cause

above entitled on May 28, 1906, as amended or supplemented by the order and decree made and entered May 31, 1906, nunc pro tunc as of May 28, 1906, in said cause, whereby it was ordered, adjudged and decreed, among other things, that the objections to the report and account of the receiver be overruled, that the account be approved and allowed as corrected, that the claim of M. S. Gunn, as solicitor and counsel for the receiver, amounting to $150, was approved and the receiver authorized and directed to pay the same, that the balance of the money remaining in the hands of the receiver be applied on the compensation allowed to him, and that the petition pro interesse suo of Herbert Strain be, and was thereby, denied and refused, and that the proceeding by way of said petition be, and was thereby, finally dismissed, does hereby petition for an order allowing him, the said Herbert Strain, petitioner pro interesse suo, to prosecute an appeal from said order and decree so entered on May 28, 1906, to the United States Circuit Court of Appeals for the Ninth Circuit, under and according to the laws of the United States in that behalf made and provided, for the reasons set out in the assignment of errors herewith filed herein, and does hereby appeal from said final order and decree; and he prays that this appeal may be allowed, and that a transcript of the record and proceedings upon which said order and decree was made, duly authenticated, may be sent to said Circuit Court of

Appeals for the Ninth Circuit, and also that an order may be made fixing the amount of security which the said petitioner shall give upon such appeal.

HERBERT STRAIN,
Petitioner pro interesse suo and Appellant.
By A. C. GORMLEY and
W. T. PIGOTT,
His Solicitors.

W. T. PIGOTT,
Of Counsel.

Order Allowing Appeal and Fixing Amount of Bond.

The foregoing petition is granted, and the appeal prayed for allowed upon said petitioner giving a bond in the sum of two hundred and fifty dollars. It is ordered that a certified transcript of the record, proceedings and papers upon which the final order and decree of May 28, 1906, was rendered, be forthwith transmitted to the United States Circuit Court of Appeals for the Ninth Circuit.

CHAS. E. WOLVERTON,
Judge.

[Endorsed]: Title of Court and Cause. Petition for Allowance of Appeal, and Order Allowing Appeal and Fixing Amount of Bond Thereon. Filed Aug. 7, 1906, Geo. W. Sproule, Clerk. By C. R. Garlow, Deputy Clerk.

And thereafter, to wit, on the 7th day of August, A. D. 1906, Herbert Strain filed his assignment of errors herein, being in the words and figures following, to wit:

[Title of Court and Cause.]

Assignment of Errors.

Now comes Herbert Strain, petitioner pro interesse suo in the above-entitled cause, by his solicitors, and says that in the order and decree in said cause entered on May 28, 1906, as amended by the order and decree of May 31, 1906, entered nunc pro tunc as of said May 28, 1906, and in the record and proceedings therein, there is manifest error, and he files the following assignment of errors committed or happening in said cause and upon which he will rely on his apepal from said order and decree:

1. The Court erred in its order of February 26, 1906, in overruling the petition pro interesse suo, in this, that the petition should have been granted.

2. The said order of February 26, 1906, was and is erroneous in that, upon the agreed statement of facts, the petition should have been granted and allowed.

3. The Court erred in overruling, on May 28, 1906, the objections of petitioner to the report and account of the receiver, for the reason that said objections should have been sustained.

4. The Court erred in overruling the objections to said report and account of said receiver, in this: It

was made to appear, by the record in said cause, that upon the sale of the real estate mortgaged, in pursuance of the decree of foreclosure, that the complainants purchased said real estate for a sum sufficient to cover their mortgage indebtedness, interest and costs, so that the said mortgage and decree entered thereon became and was satisfied in full without recourse to the hay and oats which had theretofore, on August 17, 1904, been purchased by said petitioner, or to the proceeds of said hay and oats, or any proceeds of any of said hay and oats, or either.

5. The Court erred in said order of May 28, 1906, in approving and allowing, and in approving or allowing, said report and account of said receiver, because under the petition pro interesse suo, the agreed statement of facts filed July 12, 1905, and the proceedings and record in said cause, the said report and account should have been disapproved and disallowed upon consideration of the objections aforesaid thereto, filed May 5, 1906.

6. The Court erred in overruling said objections so filed on May 5, 1906, to said report and account of said receiver, because the real property mortgaged and sold under the decree dated February 4, 1905, was bid in by complainant, Benjamin Graham, trustee, at and for the sum of $39,311.48, and said sale to him was thereafter confirmed and in all things approved, and said purchase price paid; and the oats

and hay taken and seized by said receiver, if ever subject to the lien or charge of said mortgage, was thereby released and said lien or charge extinguished, and said hay and oats, or their proceeds in the hands of the receiver, belong to and should have been ordered, delivered to petitioner, who purchased and took possession thereof on August 17, 1904, and continued to be the owner and entitled to possession of the same.

7. The Court erred in making that part of its said order of May 28, 1906, directing that the balance remaining in the hands of the receiver, after payment of the claim of his solicitor and counsel, be applied on the compensation allowed to said receiver, for the reason that such balance consisted, and consists, of said hay and oats (or the proceeds thereof) then and now owned by petitioner, who in good faith purchased and took immediate possession of the same on August 17, 1904.

8. The Court erred in that part of said order and decree of May 28, 1906, which part of said order and decree was made May 31, 1906, and directed to be entered nunc pro tunc as of May 28, 1906, as follows:

"It is ordered that the order made in this cause May 28, 1906, be amended as follows: It is further ordered, adjudged and decreed that the petition pro interesse suo of Herbert Strain in this suit be, and is hereby, denied and refused, and that the proceeding

by way of said petition be, and is hereby, finally dismissed."

Because:

(a) Upon the admitted facts shown by the record and proceedings said petition should have been granted.

(b) The crops of hay and oats purchased by petitioner from defendant H. H. Nelson Sheep Company on August 17, 1904, were chattels and not real property.

(c) Said hay and oats so purchased by said Strain were not covered by or subject to the lien or mortgage made to complainants on March 20, 1901.

(d) The service of the subpoena upon defendants in the suit to foreclose said mortgage of March 20, 1901, was not constructive notice of a lis pendens, because the doctrine of constructive notice by the service of subpoena has no application to suits involving such personal property as is the subject of ordinary commerce.

(e) Petitioner was not chargeable with constructive notice by service of the subpoena upon the defendants, for the reason that Section 634 of the Code of Civil Procedure of Montana prescribes the only method whereby constructive notice of suit may be given, and such statute applies as a rule of property; there cannot be notice by lis pendens except upon compliance with the statute.

(f) The land only was mortgaged. The land is in the nature of a pledge. The issues and profits of the land were not pledged, but belonged to the mortgagor in possession and to its assigns. In this case the mortgagor was actually in possession and control at the time when petitioner purchased the hay and oats from it. Even where the issues and profits of land are specially pledged as security, the mortgagee is not entitled to them unless and until he, or a receiver, takes actual possession. There cannot be a pledge without possession.

(g) The crops for 1904 could not be mortgaged in 1901.

(h) If in March, 1901, when said mortgage was made, the crops of 1904 could have been mortgaged, the only instrument by which they could have been mortgaged was a chattel mortgage executed and authenticated as required by sections 3849-3861 of the Civil Code of Montana. It is expressly stated in the record that no chattel mortgage was ever made.

(i) Petitioner was a purchaser of the hay and oats, in good faith, and for value.

(j) Petitioner purchased, in good faith and for value, the oats and hay, and took actual possession thereof, on August 17, 1904; and while he was so the owner and in actual possession, the Court below, on September 3, 1904, appointed said receiver, and said receiver thereafter, and while petitioner was so the owner and in possession of said chattels, wrongfully

and unlawfully took them from petitioner's possession, and refused to surrender the same, or any part thereof, to petitioner.

(k) The said mortgage of March 20, 1901, did not, and does not purport to, embrace any crops thereafter to be planted or grown on the real estate embraced in the mortgage. The provision in the mortgage that "if the grantor fails to pay any or either of said notes at maturity, or for thirty days thereafter, then all of said debt shall, at the option of the trustee, become due and collectible, and all rents and profits of said property shall then immediately accrue to the benefit of said party of the third part, and the occupants of said property shall pay rent to the trustee," did not, and could not, cover crops without a potential existence, nor does the said mortgage even attempt to create a lien thereon. Under the provision aforesaid defendant sheep company was obligated to pay rent from the time the option was exercised, and the provision did not require the mortgagor to pay rent for the use of the premises and at the same time surrender the crops which he had cultivated and raised. Nor was the option exercised.

Wherefore said petitioner pro interesse suo prays that said order and decree of May 28, 1906, as the same was amended or supplemented by the order and decree of May 31, 1906 (entered nunc pro tunc as of May 28, 1906), be reversed, set aside, and for naught

held, and that said Circuit Court be directed by this Court to grant said petition pro interesse suo.

A. C. GORMLEY and
W. T. PIGOTT,

Solicitors for Herbert Strain, Petitioner and Appellant.

W. T. PIGOTT,
Counsel.

[Endorsed]: Title of Court and Cause. Assignment of Errors on Strain's Appeal to the Circuit Court of Appeals for the Ninth Circuit. Filed Aug. 7, 1906. Geo. W. Sproule, Clerk. By C. R. Garlow, Deputy Clerk.

And thereafter, to wit, on the 8th day of August, A. D. 1906, Herbert Strain filed his bond on appeal herein, being in the words and figures following, to wit:

[Title of Court and Cause.]

Bond on Appeal.

Know all men by these presents, that we, Herbert Strain, as principal, and Earle Strain and H. R. Ayer, as sureties, of the County of Cascade, State of Montana, are held and firmly bound unto H. B. Palmer, receiver, and to the above-named complainants and defendants jointly and severally in the sum of two hundred and fifty dollars ($250.00) to be

paid to them, or any of them, for the payment of which well and truly to be made we bind ourselves jointly and severally firmly by these presents. Sealed with our seals and dated the 8th day of August, 1906.

Whereas, the said Herbert Strain has taken an appeal to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the final order and decree made and entered in the above-entitled cause on the 28th day of May, 1906, as the same is amended by an order dated May 31, 1906, entered nunc pro tunc as of May 28, 1906, by the Circuit Court of the United States for the District of Montana:

Now, therefore, the condition of this obligation is such that if the above-named Herbert Strain shall prosecute his appeal to effect and answer all costs if he fail to make his said plea good, then this obligation to be void, but otherwise to remain in full force and virtue.

HERBERT STRAIN. [Seal]
EARLE STRAIN. [Seal]
H. R. AYER. [Seal]

The foregoing bond is approved by me.

CHAS. E. WOLVERTON,
United States District Judge, sitting in the Circuit Court of the United States for the District of Montana.

State of Montana,
Cascade County,—ss.

Earle Strain and H. R. Ayer, being severally sworn, each for himself deposes that he is one of the sureties named in the foregoing bond, and that he is worth five hundred dollars over and above his just debts and liabilities and property exempt from execution, and that he is a resident and freeholder within the State of Montana.

EARLE STRAIN.
H. R. AYER.

Sworn to before me, this August 6th, 1906.

[Notarial Seal] A. R. METTLER,
Notary Public in and for Cascade County, Montana.

[Endorsed]: Title of Court and Cause. Bond on Appeal and Approval Thereof. Filed and Entered Aug. 8, 1906. Geo. W. Sproule, Clerk.

Citation.

UNITED STATES OF AMERICA—ss.

The President of the United States, to H. B. Palmer, Receiver; Benjamin Graham, Trustee; The American Freehold Land Mortgage Company, of London, England, Limited; H. H. Nelson Sheep Company; H. H. Nelson, and James T. Stanford:

You are hereby notified, that in a certain suit in equity in the United States Circuit Court, Ninth Circuit, in and for the District of Montana, wherein said Benjamin Graham, trustee, and the said The American Freehold Land Mortgage Company of London, England, Limited, were and are complainants, and said H. H. Nelson Sheep Company, H. H. Nelson, and James T. Stanford were and are defendants, and said H. B. Palmer was receiver, and Herbert Strain was and is petitioner pro interesse suo, an appeal has been allowed said petitioner therein to the United States Circuit Court of Appeals for the Ninth Circuit, from the final order and decree made and entered in said cause in said Circuit Court for the District of Montana on May 28, 1906, overruling the objections to the account and report of said receiver and approving and allowing the same as correct, approving the claim of the receiver's solicitor and directing payment of said claim, ordering the receiver to apply the balance of the moneys remaining in his hands on the receiver's compensation, and denying the petition pro interesse suo of said Strain, and finally dismissing the proceeding by way of said petition as said final order and decree was amended or supplemented by the order and decree of May 31, 1906, entered nunc pro tunc as of said May 28. You are hereby cited and admonished to be and appear in said Circuit Court of Ap-

peals in San Francisco, California, within thirty days after the date of this citation, to show cause, if any there be, why the said order and final decree appealed from should not be corrected, and speedy justice done the parties in that behalf.

Witness the Honorable CHARLES E. WOLVERTON, Judge of the United States District Court for the District of Oregon, sitting and presiding in said Circuit Court for the District of Montana under designation and appointment as prescribed by law, and discharging all the judicial duties of the Honorable William H. Hunt, as Judge of said District Court for the District of Montana and as Judge presiding in the said Circuit Court of and for the District of Montana, this eighth day of August, A. D. 1906.

CHAS. E. WOLVERTON,
United States District Judge presiding.

[Seal] Attest: GEO. W. SPROULE,
Clerk.

Service of the foregoing citation, and receipt of a copy thereof, admitted this August 9, 1906.

M. S. GUNN,
Solicitor for H. B. Palmer, Receiver, and for the Complainants named in said Citation.

JAMES T. STANFORD.
H. H. NELSON SHEEP CO.
By H. H. NELSON, Prest.
H. H. NELSON.

[Endorsed]: No. 705. Benj. Graham, Trustee, et al., vs. H. H. Nelson Sheep Co., et al. H. B. Palmer, Receiver; Herbert Strain, Petitioner p. i. suo. Citation on Appeal, and Admission of Service Thereof. Filed and entered Aug. 2, 1906. Geo. W. Sproule, Clerk.

Clerk's Certificate to Transcript.

United States of America,
District of Montana,—ss.

I, Geo. W. Sproule, Clerk of the United States Circuit Court, Ninth Circuit, District of Montana, do hereby certify and return to the Honorable, the United States Circuit Court of Appeals for the Ninth Circuit, that the foregoing volume consisting of 93 pages, numbered consecutively from 1 to 93, is a true and correct transcript of the pleadings, process, decree, and all proceedings had in said cause, and of the whole thereof, as appears from the original records and files of said court in my possession, as requested by attorneys for appellant in accordance with a praecipe for transcript filed herein; and I do further certify and return that I have annexed to said transcript and included within said paging the original citation issued in said cause.

I further certify that the costs of the transcript of record amount to the sum of thirty-nine and sixty

one-hundredths dollars ($39.60), and have been paid by the appellant.

In witness whereof, I have hereunto set my hand and affixed the seal of said United States Circuit Court for the District of Montana, at Helena, Montana, this 31st day of August, A. D. 1906.

[Seal] GEO. W. SPROULE,
Clerk.

[Endorsed]: No. 1371. United States Circuit Court of Appeals for the Ninth Circuit. Herbert Strain, Appellant, vs. H. B. Palmer, Receiver, Benjamin Graham, Trustee, The American Freehold Land Mortgage Company of London, England, Limited, H. H. Nelson Sheep Company, H. H. Nelson and James T. Stanford, Appellees. Transcript of Record. Upon Appeal from the United States Circuit Court for the District of Montana.

Filed September 7, 1906.

F. D. MONCKTON,
Clerk.
By Meredith Sawyer,
Deputy Clerk.

NO. 1371

IN THE

United States Circuit Court of Appeals for the Ninth Circuit

HERBERT STRAIN, Appellant,

vs.

H. B. PALMER, Receiver; BENJAMIN GRAHAM, Trustee; THE AMERICAN FREEHOLD LAND MORTGAGE COMPANY OF LONDON, ENGLAND, LIMITED; H. H. NELSON SHEEP COMPANY, H. H. NELSON AND JAMES T. STANFORD,

Appellees.

APPEAL FROM THE UNITED STATES CIRCUIT COURT FOR THE DISTRICT OF MONTANA.

APPELLANT'S BRIEF.

A. C. GORMLEY,
Great Falls, Montana,
W. T. PIGOTT,
Helena, Montana,
Counsel for Appellant.

NO. 1371

IN THE

United States Circuit Court of Appeals for the Ninth Circuit

HERBERT STRAIN, Appellant,

vs.

H. B. PALMER, Receiver; BENJAMIN GRAHAM, Trustee; THE AMERICAN FREEHOLD LAND MORTGAGE COMPANY OF LONDON, ENGLAND, LIMITED; H. H. NELSON SHEEP COMPANY, H. H. NELSON AND JAMES T. STANFORD,

Appellees.

'PEAL FROM THE UNITED STATES CIRCUIT OURT FOR THE DISTRICT OF MONTANA.

APPELLANT'S BRIEF.

A. C. GORMLEY,
Great Falls, Montana,
W. T. PIGOTT,
Helena, Montana,
Counsel for Appellant.

In the United States Circuit Court of Appeals for the Ninth Circuit

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HERBERT STRAIN, Appellant,

vs.

H. B. PALMER, Receiver; BENJAMIN GRAHAM, Trustee; THE AMERICAN FREEHOLD LAND MORTGAGE COMPANY OF LONDON, ENGLAND, LIMITED; H. H. NELSON SHEEP COMPANY, H. H. NELSON AND JAMES T. STANFORD,

Appellees.

APPELLANT'S BRIEF.

I.

ABSTRACT OF THE CASE.

This is an appeal from a final order and decree denying a Petition pro interesse suo agd dismissing the proceeding by way of the Petition.

The facts are these: On March 20, 1901, Appellee Nelson Sheep Company made to Appellee Graham, as Trustee for Appellee The American Freehold Land Mortgage Company, as beneficiary, its mortgage to secure payment of thirty thousand dollars to the beneficiary. The mortgage embraced only lands and appurtenances (Record 16, 17, 22). One of its provisions is this: "If the said grantor * fail to comply with any of the conditions of this in-

denture, then all of said debt secured hereby shall, at the option of the trustee * become due and collectible and all rents and profits of said property shall then immediately accrue to the benefit of said party of the third part (beneficiary), and the occupants of said property shall pay rent to the trustee * . And upon such failure * the grantor * does fully empower said trustee, * to collect and sue for any rents due, or to become due on sail premises, and without process of law to enter upon and take possession of * and sell the property hereinafter conveyed * ." (Rec. 23, 24). The trustee and beneficiary filed their bill of foreclosure on April 11, 1904, and on April 28 the Sheep Co. and Nelson, and on May 3d defendant Stanford, admitted service of the subpoena (Rec. 33). Meanwhile, on April 16, an ex parte order was made restraining the Sheep Company from selling or disposing of "any of the property described in the trust deed or mortgage made a part of the bill of complaint in this suit, and recorded in the office of the Clerk and Recorder of Cascade County, Montana, in Book 18 of Mortgages, page 249, until the further order of the Court herein," and requiring defendants to show cause on May 17 "why a receiver of the property described in said trust deed, and the rents, issues and profits thereof, should not be appointed as prayed for" in the bill. Defendants admitted service of this order on the day it was made (Rec. 34, 35). On September 3, 1904, defendants Sheep Company and Nelson filed their consent to the appointment of a receiver, they "being in the possession of the property de-

scribed in the trust deed or mortgage made a part of the bill of complaint * , hereby consent to the granting of the prayer of said bill * for the appointment of a receiver to take possession, manage, operate and hold said property during the pendency of this suit, and to receive and collect the rents, issues and profits thereof * ." (Rec. 35, 36). This consent was signed April 18, 1904, (Rec. 36); but, owing to the circumstances over which complainants had no control, it was not filed or acted upon until September 3 (Rec. 65). On that day the court appointed Palmer receiver, "it appearing that the property described in the trust deed or mortgage * is in the possession of the defendant H. H. Nelson Sheep Company. * It is * decreed that H. B. Palmer * is hereby appointed receiver of all and singular the said property described in said trust deed or mortgage, together with the income, issues and profits thereof. And * defendant sheep company * are hereby restrained, * during the pendency of this suit, from interfering with, transferring, selling or disposing of any of said property, or from taking possession thereof * ." (Rec. 37, 38).

On October 24, 1904, Herbert Strain, now appellant, duly filed a petition pro interesse suo, serving it upon the solicitor representing both the receiver and the complainants (Rec. 45, 51, 68, 74). An order was made requiring an answer or response to be made to the petition (Rec. 51), and an agreed statement of facts was filed (Rec. 59) showing, in addition to the matters disclosed by the foregoing, that Strain was, and had been, a merchant, trad-

ing as Strain Brothers, and had actual notice before August 17, 1904, of the fact that a foreclosure suit had been commenced, but had neither notice nor knowledge of the restraining order or order to show cause of April 14, or that complainants had prayed for such orders; that he first acquired such notice or knowledge after August 17, that if he was chargeable with constructive notice it is by reason only of the doctrine of lis pendens; that he had no actual notice or knowledge that the mortgage purported (if it did purport) to cover, or impose a lien upon, rents, issues and profits; that he had no kind or sort of notice of the consent to the appointment of a receiver (Rec. 65); that the mortgage was not accompanied by the affidavit required by Sections 3849 and 3861 of the Civil Code of Montana, or any affidavit whatever; that the Sheep Company, mortgagor, remained in the actual and exclusive possession, custody and control of all said real property from March 20, 1901, to September 4, 1904, when the receiver entered into possession thereof; that the hay and oats, sold to Srtain on August 17, as will hereinafter appear, were grown upon the lands, but were never at any time delivered to or in the possession of complainants or either of them, but remained at all times in the actual possession of the mortgagor Sheep Company until August 17, 1904, when the sale to Strain was made (Rec. 60, 61, 62); that on that day the hay and oats had ceased to derive nourishment from the soil, were ripe, mature, and ready for the harvest, and a part had been cut down, and all were in the possession of the mort-

gagor Sheep Company; that said company was then indebted to Strain in a sum exceeding the value of said chattels, upon an express contract for the direct payment of the money, to-wit, upon a promise to pay Strain the price of goods and wares theretofore sold and delivered by him to it, which debt was then past due and wholly unpaid, and the payment thereof had not been, and was not at any time, secured either in whole or in part by any mortgage, lien or pledge whatsoever (Rec. 62, 63); that on that day and while the mortgagor was so in exclusive possession, and while Strain was without any knowledge, notice or information, that complainants asserted any lien upon the hay and oats (unless he was charged with constructive notice by reason of the pendency of the suit), Strain bought of the mortgagor, and the mortgagor sold to him, the hay and oats (Rec. 63); that the sale was made in payment and discharge of said antecedent and then existing indebtedness, and was evidenced by the following instrument in writing:

"For value received, the undersigned, H. H. Nelson Sheep Co., a corporation, does hereby sell, assign and transfer to Strain Bros., copartners doing business in Great Falls, Cascade Countyy, Montana, all the grain and also all the hay cut and stacked, and hereafter to be cut and stacked, on all the hay land connected with the Riverdale Stock Farm, near Cascade, in the County of Cascade and State of Montana, being two hundred fifty (250) tons more or less, except such share hay as belonged to Hugh Jones and Fred Nicholson. All of said hay

and grain are this day delivered to said Strain Bros., who will hereafter have entire charge and possession of the same. The hay already cut and stacked is to be measured in the usual way at once, and the balance is to be measured in the usual way as soon as stacked.

Dated this 17th day of August, 1904.

(Signed) H. H. NELSON SHEEP CO.,

By H. H. NELSON, Prest.

President and Manager." (Rec. 47, 63).

That immediately upon the sale the mortgagor delivered the actual possession of the chattels to Strain, who continuously kept and maintained actual possession of them until September 4, on which date the receiver, who had been appointed the day before, without the consent and against the protest of Strain took possession of them and still holds them, or their proceeds, notwithstanding repeated demands by Strain for their surrender to him (Rec. 64.) Some of the hay and oats the receiver had sold for $482.82, and had expended $233.37 for twine, hauling, harvesting and haying. He still had in his possession fifty-one tons of hay and fifteen tons of straw. (Rec. 64).

A decree of foreclosure was entered February 4, 1905, declaring that "the said property (lands described in the mortgage) constitutes a single ranch or farm," and directing that it be sold as one parcel and an entirety (Rec. 40). The master sold the lands and appurtenances to complainant and appellee Graham, trustee, for $39,311.48, which was the exact sum due, including all

interest, costs, attorneys' fees, master's compensation, and even five dollars paid for typewriting the Master's report of sale (Rec. 55, 56). The sale was confirmed, and the proper receipt taken for the purchase price (Rec. 58).

On February 26, 1906, more than a year after the decree of foreclosure, and nearly a year after the sale, Strain's petition pro interesse suo was denied (Rec. 66). The receiver filed his report on April 21, 1906, (Rec. 67), to which Strain interposed objections and asked the Court that, in passing upon the report, it direct the receiver to deliver to Strain the hay and oats, to-wit, 80 tons of hay, worth $560, and 32,800 pounds of oats, worth $328, or the value of both in case he had disposed of them, with interest from September 4, 1904. The particular objection then urged was that complainants, having purchased the real property for the full amount of the debt and all costs and expenses, the mortgage was satisfied, and there could be no possible occasion for recourse to Strain's hay and oats or their proceeds (Rec. 72-3). The objections were overruled and the report approved (Rec. 74). On May 31, 1906, the last order was amended nunc pro tunc as of May 28, by adding a denial of the petition pro interesse suo, and finally decreeing a dismissal of the proceeding by way of said petition (Rec. 76). Within six months thereafter and on August 7 an order was made granting an appeal to Strain (Rec. 76, 79), and the assignment of errors was filed. A bond was given and approved, and citation issued and served (Rec. 78, 85, 87), and a transcript of the record filed in the office

of the Clerk of this Court (Rec. 91).

The ultimate question involved is whether or not appellant is entitled to the hay and oats purchased by him on August 17, 1904, or to the proceeds thereof. The questions upon which the answer to this question depends appear in the following:

II.

SPECIFICATION OF ERRORS RELIED ON.

Comes the appellant and says that in the Order and Decree entered on May 28, 1906, as amended by the order and decree of May 31, 1906, entered nunc pro tunc as of the former day, and in the record of this proceeding, there is manifest error, and he here specifies the errors committed or happening in said proceeding and upon which he relies upon this his appeal from said Order and Decree:

1. The Court erred in its order of February 26, 1906, in denying the petition pro interesse suo, in this, that the petition should have been granted.

2. The said order of February 26 was and is erroneous in that, upon the agreed statement of facts, the petition should have been granted and allowed.

3. The Court erred in overruling, on May 28, 1906, the objections of petitioner to the report and account of the receiver for the reason that said objections should have been sustained.

4. The Court erred in overruling the objections to said report of said receiver in this: It was made to appear, by the record in said proceeding and cause, that

upon the sale of the real property mortgaged, complainants purchased the same for a sum sufficient to cover, and which equalled, their mortgaged indebtedness, and all interest, costs and expenses, so that the said mortgage and decree entered thereon became and were satisfied and discharged in full, without necessity of recourse to the hay and oats which had theretofore, on August 17, 1904, been purchased by appellant, or to the proceeds of said hay and oats, or any thereof.

5. The Court erred in said order of May 28, in approving and allowing said report and account of the receiver because under the petition pro interesse suo, the agreed statement of facts filed July 12, 1905, and the proceedings and record in said cause, the said report and account should have been disapproved and disallowed upon consideration of the objections aforesaid thereto, filed May 5, 1906.

6. The Court erred in overruling the said objections so filed on May 5 to said report and account of said receiver, because the real property mortgaged and sold under the decree of February 4, 1905, was bid in by complainant, Benjamin Graham, trustee, for the sum of $39,311.48, and said sale to him was thereafter confirmed and in all things approved, and purchase price paid, and the oats and hay taken and seized by the receiver, if ever subject to the lien or charge of said mortgage, were thereby released and said lien or charge extinguished, and said hay and oats, or their proceeds in the hands of the receiver, belonged to, and should have been ordered

delivered to, petitioner, who purchased and took possession thereof on August 17, 1904, and continued to be the owner and entitled to possession of the same.

7. The Court erred in making that part of its said order of May 28, directing that the balance remaining in the hands of the receiver, after payment of the claim of his solicitor and counsel, be applied on the compensation allowed to said receiver, for the reason that such balance consisted, and consists, of said hay and oats (or the proceeds thereof) then and now owned by petitioner, who in good faith and for value purchased and took immediate possession of the same on August 17, 1904.

8. The Court erred in that part of said order and decree of May 28, which part of said order and decree was made May 31, nunc pro tunc as of May 28, as follows:

"It is ordered that the order made in this cause May 28, 1906, be amended as follows: It is further ordered, adjudged and decreed that the petition pro interesse suo of Herbert Strain in this suit be, and is hereby, denied and refused, and that the proceeding by way of said petition be, and is hereby, finally dismissed." Because:

(a) Upon the admitted facts shown by the record and proceedings, said petition should have been granted.

(b) The crop of hay and oats purchased by Strain from defendant Sheep Company on August 17, were chattels and not real property.

(c) Said hay and oats so purchased by Strain were not covered by, or subject to, the lien or mortgage made to complainants in 1901.

(d) The service of the subpoena upon defendants in the suit to foreclose said mortgage was not constructive notice of a lis pendens, because the doctrine of constructive notice by the servic of subpoena has no application to suits involving such personal property as is the subject of ordinary commerce.

(e) Appellant was not charged with a constructive notice by service of the subpoena upon the defendants, because Section 634 of the Code of Civil Procedure of Montana prescribes the only method whereby constructive notice of a suit may be given, and such statute applies as a rule of property.

(f) Only the land was mortgaged. The land was in the nature of a pledge. The issues and profits of the land were not pledged, but belonged to the mortgagor in possession, and to its assigns. In this case the mortgagor was actually in the exclusive possession and control at the time when appellant purchased the hay and oats from it. Even where the issues and profits of land are specially pledged as security, the mortgagee is not entitled to them, unless and until he, or a receiver, takes actual possession. There cannot be a pledge without possession.

(g) There could not be, as against an intervening purchaser, a mortgoge made in 1901 on crops for 1904.

(h) If in March, 1901, when said mortgage was made, the crops of 1904 could have been mortgaged as against a subsequent purchaser without notice, the only instrument by which they could have been mortgaged was a

chattel mortgage executed and authenticated as required by Sections 3849-3861 of the Civil Code of Montana. It is expressly stated in the record that no chattel mortgage was ever made.

(i) Appellant was a purchaser of the hay and oats, in good faith and for value.

(j) Appellant purchased, in good faith and for value, the oats and hay, and took actual possession thereof on August 17, 1904; and while he was so the owner and in actual possession, the Court below, on September 3, appointed said receiver, and said receiver thereafter, and while appellant was so the owner and in possession of said chattels, wrongfully and unlawfully took them from the appellant's possession and refused to surrender the same to him.

(k) The mortgage of March 20, 1901, did not purport to embrace any crops thereafter to be planted or grown on the real property subject to the mortgage. The provision in the mortgage that "if the grantor fails to pay any or either of said notes at maturity, or for thirty days thereafter, then all of said debt shall, at the option of the trustee, become due and collectible, and all rents and profits of said property shall then immediately accrue to the benefit of said party of the third part, and the occupants of said property shall pay rent to the trustee," did not and could not cover crops without a potential existence, nor does the mortgage even attempt to create a lien thereon. And under the provision aforesaid the mortgagor was obligated to pay rent from the

time the option was exercised, and the provision did not require the mortgagor to pay rent for the use of the premises and at the same time surrender the crops which he had cultivated and raised; nor did appellants exercise the option granted.

III.

BRIEF OF THE ARGUMENT.

In March, 1901, the Sheep Company made its mortgage upon land only, to secure a debt. This mortgage was not accompanied by any affidavit whatsoever. In April, 1904, a bill was filed to foreclose the mortgage, and admission of service was made by the defendants in that suit. On April 16, an order was made, without notice and ex parte, restraining the Sheep Company from selling any of the property described in the mortgage, and requiring them to show cause why a receiver of the property and its rents, issues and profits, should not be appointed.

On August 17, 1904, and always, the Sheep Company was, and had been, in the actual and exclusive possession and control of the lands and all crops thereon. On that day the appellant, Strain, was aware of the fact that a foreclosure suit had been commenced, but had neither knowledge nor notice of the restraining order or order to show cause made in April. While the Sheep Company, mortgagor, was so in the actual and exclusive possession and control of all the property, both real and personal. and on August 17, there was on the land a large amount of hay and oats, all of which had ceased to derive nutri-

ment from the soil, were ripe, mature, and ready for the harvest, and part had been cut down. These crops were then, on August 17, sold by the Company to Strain, a bona fide purchaser, in payment and satisfaction of the debt then owing and due by the Sheep Company to him, which debt was past due and wholly unpaid, and the payment thereof had not been secured either in whole or in part by any mortgage, lien or pledge. Strain took immediate possession of the hay and oats, and remained in the actual and exclusiae possession thereof until September 4, when the receiver, Palmer, who had been appointed the day before, took the possession of them from Strain, and refused to surrender such possession (Rec. 64). On February 4, 1905, a decree of foreclosure was entered, directing that the lands be sold, and thereafter and thereunder the lands were sold for $39,311.48, which was the full amount due, including all interest, costs, attorneys' fees and expenses, which sale was confirmed and the proper receipt taken for the purchase price (Rec. 40, 56, 58). Before that time, and on October 24, 1904, Strain had filed his petition pro interesse suo (Rec. 41, 51), and an agreed statement of facts was presented (Rec 59). In addition to the foregoing matters, the agreed statement of facts showed, among other things, that Strain was without any notice of any assertion by the mortgagor or trustee of any lien upon the crops (Rec. 63). On February 26, 1906, nearly a year after the sale under the decree of foreclosure, Strain's petition pro interesse suo was denied (Rec. 66), but the proceeding was not dis-

missed at that time. To the receiver's report of April 21, 1906, (Rec. 67), Strain interposed objections upon the ground that complainants, having purchased the real property for the full amount of the debt and all costs, the mortgage was satisfied, and there could be no possible occasion for recourse to Strain's hay and oats (Rec. 72-3). The objections were overruled, and the report approved on May 28. On May 31 the order last mentioned was amended nunc pro tunc as of that date, by adding a denial of the patition pro interesse suo and a decree finally dismissing the proceeding by way of the petition (Rec. 74, 76). From the order and decree of May 28, as so amended on May 31, this appeal has been taken (Rec. 76, 78, 79, 85, 87).

The proceeding by way of petition pro interesse suo was a proper remedy. Gregory v. Pike, 67 Fed. Rep. 837, 846; Wheeler v. Walton, 64 Fed. Rep. 664-667, 15 C. C. A. 33; Krippendorf v. Hyde, 110 U. S. 276, 287; Gumbel v. Pitkin, 124 U. S. 131; Comer v. Felton, 10 C. C. A. 28; Marion v. Coler, 14 C. C. A. 83; Wiswall v. Sampson, 14 How, p. 65; 2 Daniell's Chancery Pl. & Pr. 5th Ed., Sections 1057, 1058; Simpkin's Suit in Equity in the Federal Courts, 329.

1. Appellant's first contention is that, in Montana, crops, whether fructus naturales or fructus industriales, and whether severed or not, are chattels personal as between the mortgagee of the land and a purchaser from

the mortgagor.

The Civil Code was adopted in February, 1895. Section 3876 of that Code is as follows:

"The lien of a mortgage on a growing crop continues on the crop after severance, whether remaining in its original state or converted into another product, so long as the same remains on the land of the mortgagor."

This section is a literal reproduction of Section 2972 of the California Civil Code, the section borrowed having been passed April 1, 1878. It will be noted that this statute is part of Article III of Chapter 2 which has to do exclusively with mortgages of personal property. It will further be noted that Sections 3860 and 3861 of that Article provide, respectively, that any interest in personal property that is capable of being transferred may be mortgaged, and that a mortgage of personal property is void against subsequent purchasers in good faith for value unless possession be delivered and retained or the mortgage provide that the chattels may remain in possession of the mortgagor and be accompanied by an affidavit and be filed.

It should seem that the chapter declares growing crops to be chattels and subject to its provisions. If growing crops are chattels, of course matured crops are likewise chattels, at least as between a mortgagee of the land and a subsequent purchaser or mortgagee (in good faith and for value) of the crops.

And so the courts have held:

White v. Pulley, 27 Fed. Rep. 436.

Wlilis v. Moore, 59 Tex. 628.

Simpson v. Ferguson, 40 Pac. Rep. (Cal.) 104.

Simpson v. Ferguson, 112 Cal. 180, 44 Pac. Rep. 484.

Bank v. Stern, 120 Cal. 618, 52 Pac. 1006.

Modesto Bank v. Owens, 121 Cal. 123, 53 Pac. Rep. 552.

Bank v. Christie, 62 Pac. Rep. (Cal.) 400.

2. Appellant's next point is that matured crops are, irrespective of the Montana statutes, chattels, though not actually severed from the land.

Hecht v. Dettman, 56 Ia. 697, 7, N. W. 495.

Cadwell v. Alsop, 48 Kan. 571, 29 Pac. Rep. 1150.

Allen v. Elderkin, 22 N. W. Rep. (Wis.) 842.

And until the time for redemption expires, or at least until a receiver takes actual possession, the mortgagor may dispose of the crops as he pleases. He may undoubtedly do so even after suit to foreclose, and even of growing crops. A fortiori he may sell matured crops.

Cases cited in "1" supra; and Jones v. Adams, 59 Pac. Rep. (Or.) 811.

White v. Pulley, supra, is directly in point. So are Myers v. White, 1 Rawle (Pa.) 353, and Bettinger v. Baker, 29 Pa. St. 70, Everingham v. Braden (Ia.) 12 N. W. Rep. 142. and many other cases that might be cited.

Moreover, the agreed statement of facts specifically recognizes the property in controversy as "chattels." (Rec. 63-4).

3. The harsh and severe rule of notice of lis pendens,

by service upon defendant of the subpoena, has no application to suits involving such personal property as is the subject of ordinary commerce, e. g., horses, cattle, grain, and the like.

Murray v. Lylburn, 2 Johns. Ch. 441.

Warren County v. Marcy, 97 U. S. 96, 106.

Union Trust Co. v. Navigation Co., 130 U. S. 565.

In the Marcy Case the Supreme Court said (p. 105):

"It is a general rule that all persons dealing with property are bound to take notice of a suit pending with regard to the title thereto, and will, on their peril, purchase the same from any of the parties to the suit. But this rule is not of universal application. It does not apply to negotiable securities purchased before maturity, nor to articles of ordinary commerce sold in the usual way. This exception was suggested by Chancellor Kent, in one of the leading cases in this country, and has been confirmed by many subsequent decisions."

The Court of Appeals of New York said in Leitch v. Wells, 48 N. Y. 585, 613:

"It will be seen by an examination of the cases cited that the rule has always been considered a very hard one in its application to bona fide purchasers for value, and it has only been tolerated by learned judges from a supposed necessity. Chancellor Walworth, in Hayden v. Bucklin, said: 'This common-law rule of requiring purchasers at their peril to take notice of the pendency of suits in courts of justice for the recovery of property they are about to purchase, although it is really impossible

that they should actually know that such suits have been commenced, has always been considered a hard rule, and is by no means a favorite with the Court of Chancery.' This rule has most frequently been applied to purchasers of an interest in real estate, and very rarely, so far as I can learn from reported cases, to purchasers of personal property. As to real estate it has long since been abrogated by statute in this state, unless a lis pendens has been filed in the proper clerk's office. As to personal property, in this age and country of great enterprise and rapid circulation of such property, it is capable of working more mischief than good, and can hardly claim to be founded on necessity or public policy. By injunctions and receivers, transfers of the subject of an action can be prevented during its pendency; and since parties can be examined as witnesses, actual notice, when it exists, of the action or outstanding equities can more readily be shown than formerly. * * Indeed I do not think that it (the doctrine of lis pendens) has ever been applied, and I do not think it ought to be applied, to any of the aricles of ordinary commerce. Public policy does not require that it should be thus applied. On the contrary, its application to such propery would work great mischief and lead to great embarrassments. As I have before stated, it has generally been applied to real estate, and but rarely to any species of personal property. I have in mind but one case (there are doubtless others) where it has been applied to personal property."

The land only was mortgaged. The land is in the na-

ture of a pledge. The issues and profits of the land were not pledged or hypothecated, but belonged to the mortgagor in possession, which was left free to dispose of them as it might see fit.Even where the issues and profits can be and are expressly pledged as security, the law is that the mortgagee is not entitled to them unless and until he, or a receiver, takes actual possession. There cannot be a pledge of such property without possession.

Teal v. Walker, 111 U. S. 242, 248-251.

Freedman's Company v. Shepherd, 127 U. S. 494, 502.

Leavell v. Poore, 91 Ky. 321.

Jones v. Adams, 59 Pac. Rep. (Or.) 811.

1 Jones Mtgs., Sec. 670.

Hardin v. Hardin, 34 So. Car. 77, 27 Am. St. Rep. 793, and note

Bank v. Christie, 62 Pac. Rep. (Cal.) 400.

Civil Code of Mont., Sec. 3892.

Killebrew v. Hines, 104 N. C. 182, 17 Am. St. Rep. 672.

It will be observed that there is no mention made of crops, and certainly nothing that would put a third person on notice that such were intended. It is also specifically stated that after the trustee exercises the option to consider the whole obligation due, "the occupants shall pay rent to the trustee." (Rec. 23). This clause explains what is meant by rents and profits. Under this provision the Nelson Sheep Company was obligated to pay rent from the time the option was exercised, but it would certainly be unreasonable, and clearly unwarranted by

the express terms, to require the mortgagor to pay rent to the mortgagee for the use of the premises and at the same time surrender the crops which he cultivated and raised.

The crops could not have been mortgaged in 1901, having then no potential existence.

Bank v. Erreca, (Cal.) 47 Pac. Rep. 926.

Cole v. Kerr, (Neb.) 26 N. W. 598.

Rochester Co. v. Rasey, 142 N. Y. 571.

5. The only instrument by which the crops could have been mortgaged (if crops for 1904 could be mortgaged in 1901, which is denied by the cases cited in 4, supra), was a chattel mortgage executed and authenticated as required by Sections 3849 and 3861 of the Civil Code, which read:

"Sec. 3849. All mortgages, deeds of trust * of both real and personal property, executed by a corporation, are governed by the law relating to mortgages or deeds of trust of real property, and must be recorded in the office of the county clerk of every county where any part of said property is situated * but any mortgage, deed of trust * must be accompanied by the affidavit specified in Section 3861 of this code, * ."

"Sec. 3861. A mortgage of personal property is void as against creditors of the mortgagor, and subsequent purchasers and incumbrancers of the property in good faith for value, unless:

1. The possession of such property be delivered to and retained by the mortgagee; or,

2. The mortgage provide that the property may remain in the possession of the mortgagor and be accompanied by an affidavit of all the parties thereto, * *."

The mortgage now before the Court does not even purport to cover anything but land. If it should be construed as embracing crops then not planted but which might be planted and might mature years afterwards, it is apparent that the mortgage does not provide that the mortgagee may retain possession, and that the mortgage is not accompanied by the affidavit required by Section 3861. Argument upon this point seems to be unnecessary. It has been uniformly held that this statutory provision must be complied with.

6. If this Court should hold that the law of notice by lis pendens is applicable to suits respecting personal property such as hay and oats, we suggest that the rule cannot obtain in Montana for the reason that Section 634 of the Code of Civil Procedure of that state prescribes the only method whereby constructive notice of suit may be given, and that the state statute applies as a rule of property, as was held in Jones v. Smith, 40 Fed. Rep. 314 though the other cases are to the contrary. By virtue of Section 3872 of the Civil Code, and Section 1290 of the Code of Civil Procedure, the provisions of Section 634 supra, apply to suits to foreclose chattel mortgages. Broom v. Armstrong, 137 U. S. 266. If, however, the Court should decide that the matured crops were, on August 17, 1904, when purchased by Strain, or on September 4, 1904, when taken by the receiver from him, real estate,

(notwithstanding the statement of facts recognizes them as "chattels"), then we suggest and invoke as applicable to such state of facts the rule announced in Jones v. Smith, supra.

7. For aught that is shown, all the oats and hay had been severed from the land when the receiver took them on September 4, but, in view of the other points which seem to us conclusive in favor of appellant, we deem this suggestion of little moment.

The Supreme Court of the United States, in Teal v. Walker, supra, said:

"We believe that the rule is without exception that the mortgagee is not entitled to demand of the owner of the equity of redemption the rents and profits of the mortgaged premises until he takes actual possession. * * * The American cases sustain the rule that so long as the mortgagor is allowed to remain in possession, he is entitled to receive and apply to his own use the income and profits of the mortgaged estate; and, although the mortgagee may have the right to take possession upon condition broken, if he does not exercise the right, he cannot claim the rents; if he wishes to receive the rents he must take means to obtain the possession."

This doctrine applies in its full force to the case at bar. In the Teal Case the Court said that the objections against the right of the mortgagee to receive the profits were strengthened by a statute of Oregon, declaring, as does Secion 1316 of the Civil Code of Procedure of Montana: "A mortgage of real property shall not be deemed

a conveyance, whatever its terms, so as to enable the owner of the mortgage to recover possession of the real property without a foreclosure and sale." Sections 3750 and 3816 of the Civil Code are also suggestive.

8. Strain was a purchaser in good faith and for value.

Adams v. Vanderbeck, 62 Am. St. Rep. 498.

2 Pomeroy Eq. Jur. 209.

Clark v. Barnes, 72 Ia. 563, 34 N. W. Rep. 419, and a multitude of cases to the same effect.

If our contention be correct so far as the mortgagor's rights are concerned, then there could certainly be no question as to the rights of a bona fide purchaser like the petitioner.

Strain purchased without actual or constructive notice. The sale was made in satisfaction of an existing debt in excess of the value of the chattels. He waived his right to attach. Under Section 890 of the Code of Civil Procedure, providing that "in an action upon a contract, express or implied, for the direct payment of money, where the contract is not secured by any mortgage or lien upon real or personal property, or any pledge on personal property," Strain might have had the property (chattels) of the defendant Sheep Company attached. This waiver was, of itself, a sufficient present consideration for the sale. He took immediate possession, remained in the actual possession, and expended money upon the property, as owner. All the equities of the case are clearly with the petitioner and appellant.

9. If the court below be correct in its ruling against

appellant to the effect that the mortgage was a lien upon the crops, it follows that the record of the mortgage on the land was of itself notice that complainants had a lien upon the crops for every year from and including 1901. Upon that theory there can be no occasion for invoking the rule of notice by lis pendens. Such is the unsound conclusion necessarily following from the ruling of the Circuit Court.

10. Under the decree of foreclosure a sale was made of all the real property covered by the mortgage, and it was bid in for the full amount of the debt, interest, costs and all expenses. The mortgage debt was paid, and the decree satisfied without recourse to the property in controversy. The mortgagee had no right, in any event after his debt was satisfied, to meddle with appellant's property, and he should have been required to deliver it to the owner.

11. H. B. Palmer, receiver, acted only under color of his receivership, and not virtute officii. He was a trespasser from the beginning, will not be permitted to retain the amount expended by him upon the property, and he must pay interest on the value of the property at the rate of eight per cent. per annum from September 4, 1906.

It is respectfully submitted that the decree denying the petition and dismissing the proceeding pro interesse suo should be reversed, and the court below directed to grant the petition.

W. T. PIGOTT,
A. C. GORMLEY,
Counsel for Appellant.

No. 1371.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

HERBERT STRAIN,

Appellant,

vs.

H. B. PALMER, Receiver, BENJAMIN GRAHAM, Trustee, THE AMERICAN FREEHOLD LAND MORTGAGE COMPANY OF London, England, Limited, H. H. NELSON SHEEP COMPANY, H. H. NELSON and JAMES T. STANFORD,

Appellees.

BRIEF FOR APPELLEES.

M. S. GUNN,
Attorney for Appellees.

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BRIEF FOR APPELLEES.

Order Appealed From.

The petition by which the appellant asserted a claim to the hay and oats was denied by an order entered on the 26th day of February, 1906. (Record, p. 66.) Afterwards, and on the 5th day of May, 1906, appellant filed objections to the final report and account of the receiver. (Rec., p. 72.) In the objections filed it is stated that the same are

> "based upon the fact, as shown in the said receiver's report, that at the sale of the said real estate, in pursuance of the decree of this court, the complainants herein purchased all of said real estate for a sum sufficient to cover their mortgage indebtedness, in-

> terest and costs, so that the said mortgage thereby became satisfied in full, without recourse to the said hay and oats, which had theretofore, to-wit, on the 17th day of August, 1904, been purchased by the undersigned, as fully appears from his petition and the agreed statement of facts on file herein." (Rec., p. 73.)

The objections were overruled by an order dated the 28th day of May, 1906. (Rec., p. 75.) This order was amended on the 31st day of May, 1906. The amendment provides:

> "That the petition *pro inter esse suo* of Herbert Strain in this suit be and is hereby denied and refused, and that the proceeding by way of said petition be, and is hereby finally dismissed." (Rec., p. 75.)

The appeal is from the order dated May 28, 1906, and the amendment thereto. The order dated Feb. 26, 1906, denying the petition, is not appealed from.

In view of these conditions it is submitted that this court can not review the decision of the circuit court denying the petition. The order dated Feb. 26, 1906, is clearly a final order from which an appeal might have been taken. This order finally disposed of the claim as presented by the petition, and the subsequent order dated May 31st is of no consequence. The only matter to be considered by this court is the correctness of the decision of the circuit court in overruling the objections to the final report and account of the receiver.

Objections to Report and Account of Receiver Properly Overruled

It will be noticed that these objections do not controvert the fact that the receiver has accounted for all property received by him, or in any manner question the report or a single item of the account, but are based solely upon the proposition that the property described in the mortgage or trust deed was sold for an amount sufficient

to pay the mortgage indebtedness and costs. In other words, appellant took the position that the receiver should be required to turn over to him the hay and oats, or the proceeds thereof, notwithstanding the expenditures made by the receiver, his claim for compensation, and a reasonable compensation to be paid his solicitor, were largely in excess of his receipts.

The circuit court, in denying the claim of appellant to the hay and oats, had decided that the receiver was properly appointed and was entitled to the possession of such hay and oats. This being true, the receiver was entitled to credit for his expenditures properly made, to an allowance for his solicitor, and to payment of his claim for compensation, notwithstanding it developed after his appointment that the property was of sufficient value to pay the mortgage indebtedness and costs. Any other rule would subject the receiver to a danger of liability and loss which would deter anyone from accepting an appointment to such office. It is alleged in the bill of complaint that the property described in the trust deed is insufficient security for the payment of the indebtedness, and that the parties liable for such indebtedness are insolvent. These allegations justified the appointment of a receiver of the rents and profits. The fact that the property may have increased in value between the date of the filing of the bill and the sale, or the fact that the complainants may have been mistaken in their judgment of the value of the property, does not determine that the appointment was invalid. If the appointment was valid and authorized, as it certainly was, the complainants can not be held liable to the receiver for his expenses or compensation, but he is required to resort to the property or fund for payment.

Ferguson v. Dent, 46 Fed. Rep. 88.

Elk Fork Oil Co. v. Foster, 99 Fed. Rep. 495, 499.
Alderson on Receivers, p. 860.

In the opinion in the first case cited the court said:

"When it becomes the duty of a court of equity to take property under its own charge through a receiver, the property becomes chargeable with the necessary expenses incurred in taking care of and saving it, including the allowance to the receiver for his services. Such is unquestionably the well-settled law, and a citation of authorities in support of it would seem to be needless. No case to the contrary has been cited by counsel, nor any in support of their position, except those heretofore noticed; and it is believed that not one decision can be found holding that the proper expenses of a receiver, or his compensation shall be taxed as costs against the losing party, where his appointment was proper and legal, and made by a court in the exercise of its undoubted jurisdiction, and where the fund in his hands is sufficient to pay the same. Nor does the legality or propriety of his appointment depend at all upon the event of the suit. Because it is ultimately determined that the plaintiff in an action is not entitled to recover or to the relief he seeks, non constat that the action of the court or the conduct of the parties in the appointment of the receiver has been irregular, improper, erroneous, or unnecessary."

Another reason why the objections were properly overruled is that the appellant was not a party to the suit. His claim to the hay and oats having been denied, he had no more right to question the report and account of the receiver than any other stranger to the litigation.

It is submitted, therefore, that the order from which this appeal is taken should be affirmed. If, however, the court should review the order denying the petition of appellant by which he asserted a claim to the hay and oats, the following is presented for the consideration of the court.

Appointment of Receiver of Rents, Issues and Profits, Authorized.

This suit was instituted to foreclose a certain mortgage or trust deed. In the bill of complaint it is alleged:

> "That the real estate and property described in said trust deed is insufficient as security for the payment of the said principal sum and interest and the performance of the covenants to be kept and performed by the said H. H. Nelson Sheep Company, as provided in said trust deed or mortgage, and that the said H. H. Nelson Sheep Company and the said H. H. Nelson are each and both insolvent." (Rec., p. 12.)

The prayer to the bill of complaint reads as follows:

> "And your orators further pray that a receiver be appointed according to the course and practice of this court, with the usual powers of receivers in like cases, of all the property described in said mortgage or trust deed, and the income, rents, issues and profits thereof, to hold and dispose of the same as by this Honorable Court may be ordered, and that the said H. H. Nelson Sheep Company be decreed to transfer and deliver possession of said property, and the whole thereof, to the receiver so appointed; and that Your Honors will enjoin the said defendant H. H. Nelson Sheep Company, its solicitors, officers, agents and servants from in any manner disposing of any of the property subject to said mortgage, or any of the income, rents, issues or profits thereof," etc.

The bill of complaint was filed on the 11th day of April, 1904, and on the same day a writ of subpoena was issued, which was served upon the defendants, the H. H. Nelson Sheep Company and H. H. Nelson on the 28th day of April, 1904. On the 14th day of April, 1904, the judge of this court made the following order in said cause:

> "IT IS ORDERED that the defendant H. H. Nelson Sheep Company, its agents, officers and servants, and all other persons, be and they are hereby restrained and enjoined from selling, disposing of, or transferring the possession of any of the property described in the trust deed or mortgage made a part of

the bill of complaint in this suit, and recorded in the office of the county clerk and recorder of Cascade County, Montana, in Book 18 of Mortgages, page 249, until the further order of the court herein; and

"IT IS FURTHER ORDERED that the defendants herein show cause before the above entitled court in Helena, Montana, where said court is held, on the 17th day of May, 1904, at the hour of ten o'clock A. M. or as soon thereafter as a hearing can be had, why a receiver of the property described in said trust deed, and the rents, issues and profits thereof, should not be appointed as prayed for in said bill of complaint in this suit."

This order was served on the defendant H. H. Nelson Sheep Company on April 16th, and on H. H. Nelson on May 3rd, 1904. (Rec. p. 33.) On the 17th day of August, 1904, the said Sheep Company then being in possession of said property, sold the hay and oats to the petitioner in payment of an antecedent and existing indebtedness. At the time of the sale a part of the crop had been cut and a part was still standing. How much had been cut does not appear. (Rec. p. 62.) Such part may have been a few pounds. The receiver was appointed on the 3rd day of September, 1904, and on the next day took possession of said crop, consisting of hay and oats. (Rec. p. 48.)

The appellant claims that by virtue of said sale to him he is entitled as against the receiver to the said hay and oats. The petition presented is in the nature of a complaint in an action of claim and delivery under the statutes of Montana.

The right of the receiver to the property in question is not based upon any provision of the mortgage or trust deed pledging the rents, incomes and profits and providing for the appointment of a receiver in the event of a default in the payment of principal or interest. It is undoubtedly true that the provision of the mortgage or trust deed that

in the event of such default the mortgagee should be entitled to take possession or have a receiver appointed, is against public policy and void.

Teel v. Walker, 111 U. S. 242.
Couper v. Shirley, 75 Fed. Rep. 168.

In the bill of complaint it is alleged that the property described in the mortgage or trust deed is probably of insufficient value to secure the payment of said mortgage indebtedness, and that the defendants, the H. H. Nelson Sheep Company and H. H. Nelson, the parties liable for the payment of such indebtedness, are both insolvent. These allegations, when properly supported by proof, are sufficient to authorize a court of equity to appoint a receiver of the rents, income and profits of the property, irrespective of any provision in the mortgage pledging the same as security for the payment of the mortgage indebtedness, or any provision with reference to the appointment of a receiver. When the conditions mentioned obtain the mortgagee has the equitable right to have the rents, income and profits impounded and held for the payment of any deficiency that may remain after the application of the proceeds of the mortgaged property.

Astor v. Turner, 11 Paig. Chan. 436.

In the case just cited the chancellor said:

"The holder of a mortgage which has become due, and where the proceeds of the mortgaged premises are not, or when they probably will not be, sufficient to pay his debt and costs, and where the mortgagor or other person who is personally liable for the deficiency is insolvent, may apply for a receiver, to secure the rents and profits of the mortgaged premises which have not yet been collected. In this way he may obtain a specific lien upon the rents and profits to pay such deficiency, or the anticipated deficiency, although he can not call upon the owner of the equity of redemption in the mortgaged premises to refund

rents and profits which the latter had collected or received before the mortgagee attempted to get a specific lien upon such rents and profits by the appointment of a receiver."

See also:

Sea Ins. Co. v. Stebbins, 8 Paig. Chan. 565.
Central Trust Co. v. Chattanooga, 94 Fed. Rep. 275, 281.

In the last case cited the court said:

"When the mortgaged property is not of value sufficient to secure the payment of the mortgage debt, or when its sufficiency becomes substantially doubtful, and the mortgagor is insolvent, accruing interest matured and unpaid, like accruing taxes due and unpaid, takes the character of waste as clearly and distinctively as deteriorations by the cutting of timber, suffering dilapidation, etc.,—the leading illustrations from the earliest time in the adjudged cases and with text writers. In such cases courts of equity always have the power to take charge of the property by means of a receiver, and to preserve not only the corpus but the rents and profits for the satisfaction of the debt."

Omaha Hotel Co. v. Kountze, 107 U. S. 378.
Bank of Auburn v. Roberts, 44 N. Y. 192, 203.

In the last case cited the court said:

"A mortgage of land carries with in, in equity, a right to the accruing rents, when there has been a default, and the security is inadequate and the debtor insolvent. The court will appoint a receiver in such a case to hold the rents till the event is ascertained. The mortgage is thus made to operate as an equitable assignment of the rents."

See also:

Am. & Eng. Enc. of Law, Vol. 23, p. 1026, and cases cited in note.

Petitioner Charged with Notice of Pendency and Purpose of Suit.

The appellant in this case is charged with notice of the institution of this suit and of its purpose, by virtue of the doctrine of *lis pendens*. In the case of Dovey's Appeal, 97 Pa. St. 160, the court say:

> "It (*lis pendens*) affects a purchaser, not because it amounts to notice, but because the law does not allow litigant parties to give to others, pending the litigation, rights to the property in dispute, so as to prejudice the other party. * * * This is a rule of public policy, and the object of it is to prevent the parties from making a conveyance *pendente lite* of the property or thing which is the subject matter of the controversy, and thus to defeat the execution of the decree of the court. The effect of it is to impose a disability to convey from the time of the service of the subpoena upon the defendants. The court, in the execution of its decree, pays no regard even to a bona fide purchaser. In other words, no change of ownership during a suit will prevent the execution of a decree, as it would have been executed had there been no change."

In the case of Leitch v. Wells, 48 N. Y. 585, 608, the court says:

> "It is a rule in equity, long established and acted on, that a purchase made of property actually in litigation *pendente lite*, although for a valuable consideration and without any express or implied notice, affects the purchaser in the same manner as if he had such notice, and he will accordingly be bound by the judgment or decree in the suit. This rule is said to rest upon the presumption that every man is attentive to what passes in the courts of justice of the state or sovereignty where he resides, and to be founded upon public policy; for otherwise alienations and transfers of title made during the pendency of a suit might defeat its whole purpose, and there would be no end to litigation."

See also:

Union Trust Co. v. Navigation Co. 130 U. S. 565.
Murray v. Ballou. 1 John Chan. 566.
Pomeroy Eq. Jur., 3rd. Ed., Vol. 2, Sec. 632, et seq.
Story's Eq. Jur., Secs. 405-6.
Am. & Eng. Enc. of Law, 2nd Ed., Vol. 21, p. 604.
Extended note, 56 Am. St. Rep. 853.

The purpose of the bill of complaint was not only to secure the application of the proceeds of the sale of the mortgaged property to the payment of the mortgaged indebtedness, but also to enforce the equitable right or lien against the rents, issues and profits which existed, by reason of the insufficiency of the security and the insolvency of the parties liable for the payment of the mortgaged indebtedness. The appellant is conclusively presumed to have had knowledge of the fact that the object of the suit was to secure the benefit of the equitable lien or right mentioned at the time he made his alleged purchase.

Furthermore, the agreed statement of facts discloses that appellant "had actual notice that said suit had been commenced to foreclose said trust deed or mortgage before the purchase by him of the property involved in this controversy." (Rec., p. 61). Although he did not have actual knowledge of the prayer of the bill of complaint, or of the order to show cause, his knowledge of the pendency of the suit was sufficient to put him upon inquiry, and he should be treated as having notice of the application for the appointment of a receiver.

Section 4667 of the Civil Code of Montana reads as follows:

> "Every person who has actual notice of circumstances sufficient to put a prudent man upon inquiry as to a particular fact, has constructive notice of the fact itself in all cases in which, by prosecuting such inquiry, he might have learned such facts."

It is also claimed in behalf of appellant that the state statute providing for the filing of notice of the pendency of an action should be regarded as a rule of property and applies to the federal courts. The case of Jones v. Smith, 40 Fed. Rep. 314, is cited in support of this proposition. In the opinion in the case the court said:

> "In the memorandum filed on the former motion it was substantially held that the state statute applied as a rule of property, and that lis pendens in a federal court was not available as notice to innocent purchasers, unless notice thereof is filed, as the statute requires. By filing such notice, therefore, the complainant can effectually prevent the transfer of the property. *Should it turn out, however, that the state statute does not apply, then, under the decisions of the supreme court which were considered on the prior motion, the old harsh doctrine of lis pendens will operate to effect the same result.*" (Italics mine.)

It thus appears that the court did not express a positive opinion, but doubted the correctness of the former holding.

In the case of McClaskey v. Barr, 48 Fed. Rep. 130, decided by Circuit Judge Jackson and District Judge Sage, it was held that the state statute on the subject of lis pendens does not apply to suits in equity in the federal court. The court said:

> "The section referred to is part of the Code of Civil Procedure in the State of Ohio, and does not apply in this court in a suit in equity, nor is it a rule of property in such sense as to make it binding here."

See also:

Rutherglen v. Wolf, Fed. Case, No. 12175.

It is further contended in behalf of appellant that the doctrine of lis pendens does not apply to personal property. In the case of Town of Enfield v. Jordon, 119 U. S. 680, Mr. Justice Bradley, who delivered the opinion, said:

"Rights to real property and personal chattels within the jurisdiction of the court, and subject to its power, may be affected by lis pendens, but not those acquired by the transfer of negotiable securities or by the sale of articles in market overt in the usual course of trade."

See also:

Am. and Eng. Enc. of Law, Vol. 21, p. 626, et seq.

As growing crops, or crops which have matured but which have not been severed from the soil, are not the subject of sale in market overt in the usual course of trade, or are not articles of commerce, the doctrine of lis pendens clearly applies thereto. It is only such personal property as horses, cattle, grain, etc., which are moveable and subject to manual delivery, that are exempt from the doctrine. There is no more reason why the doctrine of lis pendens should not apply to crops which have not been harvested than there is why it should not apply to the land itself.

Application for Appointment of Receiver Prevented Sale of Hay and Oats.

It is held that actual seizure of property is not necessary to the jurisdiction of the court in a case where the possession of the property is necessary to the relief sought. The filing of the bill, it is said, operates as an equitable levy upon the property. In view of these considerations, where a suit is instituted in a federal court, one of the objects of which is the appointment of a receiver, the jurisdiction attaches at the time of the service of the subpoena, so as to prevent a state court from entertaining a later application for the appointment of a receiver over the same property.

Louisville Trust Co. v. Knott, 130 Fed. Rep. 820.
Adams v. Mercantile Trust Co., 66 Fed. Rep. 617.

In the last case cited the court said:

"The possession and control of the railroad were absolutely necessary to the exercise of the jurisdiction of the court. The filing of the bill, and the service of process thereunder was an equitable levy upon the property."

In the case of Memphis Sav. Bank v. Douglas, 115 Fed. Rep. 96, 111, the court said:

"The federal circuit court had acquired full jurisdiction of the bill, which was filed by the plaintiff to enforce and administer the trust, before any of the writs of attachment were levied, and although the receiver, who was subsequently appointed, may not have acquired actual possession of some of the lands before the levies were made, yet within the doctrine last stated the land was not subject to seizure under the writs of attachment, it being, potentially at least, *in custodia legis*."

In the case of Belmont Nail Co. v. Columbia Iron and Steel Co., 46 Fed. Rep. 8, it was held that an assignment for the benefit of creditors made by a corporation after service of process on it in a suit by a creditor for the appointment of a receiver, does not deprive the court of jurisdiction to appoint such receiver. In the opinion the court said:

"The right of the complainant, upon the insolvency of the defendant company, to file its bill for the benefit of itself and such other creditors as might join, for the purpose of obtaining the aid of the court sitting in equity, to apply the assets of the corporation to the payment of its debts, being unquestioned, it necessarily follows that, upon the service of the subpoena upon the defendant company, the jurisdiction of this court was complete, both as to the parties and the subject matter. This as the record shows, was on the 26th day of March, 1891. Hence the relation of the parties and the status of the property in question must be considered as of that date. No subsequent action of one of the parties could affect the rights of the other party. Any disposition by the defendant company of its assets (except the sale of

personal property or transfer of negotiable securities to bona fide purchasers) would be invalid, as against the rights of the other party."

See also:

Gaynor v. Blewett, 33 Am. St. Rep. 47.
Jackson v. Losee, 4 Sandf. Chan. 381.

By virtue of the allegations in the bill of the insufficiency of the security and the insolvency of the parties liable for the payment of the indebtedness, and the application for the appointment of a receiver, a specific lien was acquired upon the rents, issues and profits of the real estate.

Astor v. Turner, 11 Pag. Chan. 436.

The lien thus created is analagous to the lien created by the filing of a creditor's bill and the service of process.

King v. Goodwin, 130 Ill. 102; 17 Am. St. Rep. 277. Extended note to 90 Am. Dec. 295, where many cases are cited in support of the proposition stated in the following language:

"In general, where no specific lien has been acquired upon the property before suit, the filing of a creditor's bill in equity to reach personal assets of the debtor will operate as a specific lien in the nature of an attachment or equitable levy upon the properties sought to be charged, and will confer priority of right to payment out of the proceeds as against other creditors or purchasers pendente lite."

In the case of Farmers' Loan & Trust Co. v. Detroit Co., 71 Fed. Rep. 29, it was held that after the institution of a suit to foreclose a mortgage covering all the property and net earnings of a railroad company, no lien on such earnings can be acquired by a general creditor. In the opinion the court said:

"But, if the fund here in controversy was liable to the seizure at the instance of creditors, no step was taken by petitioner before this suit was commenced to arrest it in the hands of the mortgagor or its agent."

In the opinion the court also said:

> "By the institution of the foreclosure suit in this court on the 4th of September, 1893, this court acquired jurisdiction of the property, and took possession thereof for the purpose of administering the same, and enforcing the remedies of the complainant and other lien creditors, and thereby exempted the property from the process of any other tribunal. Having then no lien upon this fund, petitioner could acquire none upon it, or on any part of the mortgaged property, *after the institution of this suit.*"

In the case of Freedman's Savings & Trust Co. v. Shepherd, 127 U. S. 494, the court said:

> "It is, of course, competent for the parties to provide in the mortgage for the payment of the rents and profits to the mortgagee, even while the mortgagor remains in possession. But when the mortgage contains no such provision, and even where the income is expressly pledged as security for the mortgage debt, with the right in the mortgagee to take possession upon failure of the mortgagor to perform the conditions of the mortgage, the general rule is that the mortgagee is not entitled to the rents and profits of the mortgaged premises until he actually takes possession, or until possession is taken in his behalf by a receiver, *or until in proper form he demands and is refused possession.*" (Italics mine.)

In the case of Dow v. Memphis & Little Rock R. Co., 124 U. S. 652, it is held that the institution of a suit to foreclose and for the appointment of a receiver is such a demand of possession as will entitle the mortgagee to the rents, income and profits from the time of the institution of the suit, although the receiver is not appointed until some time subsequently. In the opinion the court said:

> "It follows that from the time of the bringing of the suit the company itself is to be treated in all respects as a receiver of the property, holding for the benefit of whomsoever in the end it should b found to concern and liable to account accordingly."

See also:

Barron v. Whiteside, 43 Atl. 825.

It appears from the agreed statement of facts that the suit was instituted and the application made for the appointment of a receiver about the middle of April. This was before the grain was planted. As the right of the mortgagee must be determined by the conditions existing when the application for the appointment of the receiver was made the question really presented is whether or not a crop sown and grown after such application is made can be taken.

The Appellant Was an Intermeddler with Property in Litigation, and Is Bound by the Result of Such Litigation.

In the case of Tilton v. Cofield, 93 U. S. 163, the supreme court say:

> "The law is that he who intermeddles with property in litigation does it at his peril, and is as conclusively bound by the results of the litigation, whatever they may be, as if he had been a party to it from the outset."

In the case of Mellen v. Iron Works 131 U. S. 352, the court say:

> "Purchasers of property involved in a pending suit may be admitted as parties, in the discretion of the court; but they can not demand, as of absolute right, to be made parties, nor can they complain if they are compelled to abide by whatever decree the court may render within the limits of its power, in respect to the interest their vendor had in the property purchased by them *pendente lite*. As said in Bishop of Winchester v. Paine (11 Ves. 194, 197), 'the litigating parties are exempted from the necessity of taking any notice of a title so acquired. As to them it is as if no such title existed.'"

Right to Have Receiver of Rents, Issues and Profits, Appointed Not Controlled by State Law.

The right to have the rents, issues and profits of real estate embraced in a mortgage preserved for the payment of any deficiency judgment is one existing by virtue of the general principles of equity jurisprudence. The jurisdiction and power of this court as a court of equity to preserve rents, issues and profits pending the determination of the question of whether or not the property mortgaged is sufficient security and the debtor insolvent, can not in any manner or to any extent be controlled by any state statute. In the case of Ex parte Tyler, 149 U. S. 164, the court said, in speaking of a state statute which prohibited the issuing of an injunction to prevent the collection of illegal taxes:

> "Manifestly the object of this legislation was to confine the remedy of the taxpayer for illegal assessment and taxation, to the payment of taxes under protest and bringing suit against the county treasurer for recovery back. But all this is nothing to the purpose. The legislature of a state can not determine the jurisdiction of the courts of United States, and the action of such courts in according a remedy denied to the courts of a state does not involve a question of power."

Right of Mortgagee to Rents and Profits Conferred by Mortgage.

It is provided in the mortgage that upon the failure of the mortgagor to comply with the conditions thereof "all rents and profits of said property shall then accrue to the benefit of the mortgagee." This provision is valid.

O'Hara v. Mobile & O. R. Co., 75 Fed. Rep. 130, 133.

* * * * * *

In the brief for appellant, at page 24, it is said:

> "If the court below be correct in its ruling against appellant to the effect that the mortgage was a lien upon the crops," etc.

The record does not disclose that the court so held. It is not claimed by appellees that the mortgage created a lien upon the crops. The contentions of appellees are fully stated, and it will be presumed that the court, in denying the petition, did so in the light of the admitted facts and the law applicable thereto, to which attention has been directed.

The circuit court did not commit error in denying the petition.

Respectfully submitted,

M. S. GUNN,

Attorney for Appellees.

No. 1371

IN THE

UNITED STATES

Circuit Court of Appeals

FOR THE NINTH DISTRICT

HERBERT STRAIN, Appellant,

vs

H. B. PALMER, Receiver,
BENJAMIN GRAHAM, Trustee,
THE AMERICAN FREEHOLD LAND MORTGAGE COMPANY OF LONDON, ENGLAND, LIMITED, H. H. NELSON SHEEP COMPANY, H. H. NELSON AND JAMES T. STANFORD, Appellees.

APPELLANT'S REPLY BRIEF.

A. C. GORMLEY,
W. T. PIGOTT,
Solicitors and Counsel for Appellant.

Husbandman Job Print Great Falls, Montana.

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APPELLANT'S REPLY BRIEF.

Appellees suggest on page two of their brief that the order of February 26, 1906, (Record 66), denying the petition pro interesse suo is "clearly a final order from which an appeal might have been taken. This order finally disposed of the claim as presented by the petition, and the subsequent order dated May 31st is of no consequence." The so-called "subsequent order" is the final decision or decree of May 28, 1906, as amended by the final decision

or decree of May 31, 1906, entered nunc pro tunc as of the former date. (Rec. 74-76). This final decision and decree, among other things, denied and refused the petition, and finally dismissed the proceedings by way of the petition. (Rec. 76).

The suggestion made by the Appellees is that, since the order of February 26, 1906, merely denying the petition, is not appealed from, it finally disposed of the claim as presented by the petition, and "the subsequent order," dated May 31, is not of moment.

We answer the suggestion of Appellees by calling attention to the fact that under Section 6 of the Act Establishing the Circuit Courts of Appeals, this Court may exercise appellate jurisdiction from final decisions only of district and circuit courts, except in interlocutory orders or decrees with respect to injunctions or receivers. The order of February 26 was a mere denial of the petition, and in no wise was a final decision or decree. That order left the proceeding still pending in the Circuit Court, and not until the order of May 31, entered nunc pro tunc as of May 28, was there a final decision. The order of February 26 was not appealable; the final decision and decree of May 28 is appealable.

Our position is manifestly sustained by the reason of the thing, and by an unbroken line of cases, a few of which we venture to cite:

Robinson v. Belt, 5 C. C. A. 521;

Potter v. Beal, 2 C. C. A. 60;

Trust Co. v. Madden, 17 C. C. A. 238;

Bissell Carpet-Sweeper Co. v. Goshen Sweeper Co., 19 C. C. A. 25;

Trust Co. v. Sullivan, 23 C. C. A. 458;

Jones v. Sands, 25 C. C. A. 233;

Ries v. Henderson, 24 C. C. A. 194;

Latta v. Kilbourn, 150 U. S. 524.

The appeal from the order of May 28 raises, and presents to this court, all the errors assigned by Appellant, and these include the denial of the petition..

A. C. GORMLEY,

W. T. PIGOTT,

Solicitors and Counsel for Appellant.

No. 1372

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

RICKEY LAND AND CATTLE COMPANY (a Corporation),

Appellant,

vs.

JAMES NICHOL, F. FEIGENSPAN, ANGUS McLEOD, MARY T. SHAW, DEWITT CROWNINSHIELD, M. J. GREEN, C. F. MEISSNER, HAMILTON WISE, J. F. HOLLAND, C. F. HOLLAND, THOS. HALL, E. S. CROSS, D. J. BUTLER, J. S. SWEETMAN, JOHN COMPSTON, J. C. MILLS, A. W. GREEN and SPRAGG-WOODCOCK DITCH COMPANY (a Corporation),

Appellees.

Transcript of Record.

Upon Appeal from the United States Circuit Court for the District of Nevada.

FILMER BROS. CO. PRINT, 1642 HOWARD STREET, S. F.

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In the United States Circuit Court of Appeals, Ninth Circuit.

JAMES NICHOL, F. FEIGENSPAN, ANGUS McLEOD, MARY T. SHAW, DeWITT CROWNINSHIELD, M. J. GREEN, C. F. MEISSNER, HAMILTON WISE, J. F. HOLLAND, C. F. HOLLAND, THOMAS HALL, E. S. CROSS, D. J. BUTLER, J. S. SWEETMAN, JOHN COMPSTON, J. C. MILLS, A. W. GREEN, and SPRAGG-WOODCOCK DITCH COMPANY (a Corporation),

Complainants,

vs.

THE RICKEY LAND AND CATTLE COMPANY (a Corporation),

Defendant.

Order Extending Time to Docket Cause.

Good cause therefore appearing, it is hereby ordered, that the time wherein defendant and appellant in the above-entitled action may file the record thereof and docket the case with the clerk of this Court at San Francisco, California, may be enlarged

and extended, so as to extend to and include the 23d day of September, 1906, and it is so ordered.

Dated this 22d day of August, 1906.

W. W. MORROW,
Circuit Judge.

[Endorsed]: No. 1372. United States Circuit Court of Appeals for the Ninth Circuit. James Nichol et al., Complainants, vs. Rickey Land & Cattle Company (a Corporation), Defendant. Order Enlarging Time to Docket Record. Filed Aug. 23, 1906. F. D. Monckton, Clerk. Refiled Sept. 5, 1906. F. D. Monckton, Clerk.

In the Circuit Court of the United States, Ninth Circuit, District of Nevada.

JAMES NICHOL, F. FEIGENSPAN, ANGUS McLEOD, MARY T. SHAW, DeWITT CROWNINSHIELD, M. J. GREEN, C. F. MEISSNER, HAMILTON WISE, J. F. HOLLAND, C. F. HOLLAND, THOS. HALL, E. S. CROSS, D. J. BUTLER, J. S. SWEETMAN, JOHN COMPSTON, J. C. MILLS, A. W. GREEN and SPRAGG-WOODCOCK DITCH COMPANY (a Corporation),

Complainants,

vs.

THE RICKEY LAND AND CATTLE COMPANY (a Corporation),

Defendant.

Bill of Complaint.

To the Judges of the Circuit Court of the United States for the District of Nevada:

James Nichol, F. Feigenspan, Angus McLeod, Mary T. Shaw, Dewitt Crowninshield, M. J. Green, C. F. Meissner, Hamilton Wise, J. F. Holland, C. F. Holland, Thos. Hall, E. S. Cross, D. J. Butler, J. S. Sweetman, John Compston, J. C. Mills, A. W. Green and Spragg-Woodcock Ditch Company, a corporation organized and existing under and by virtue of the laws of the State of Nevada, bring this, their bill against the Rickey Land and Cattle Company, a corporation organized and existing under the laws of the State of Nevada, and having its place of business at Carson City, county of Ormsby, State of Nevada, and within the District of Nevada, and a citizen of the State of Nevada, and thereupon your orators complain and say:

1. That your orators are citizens of the State of Nevada and residents of Lyon County, Nevada, within the District of Nevada, and that the Spragg-Woodcock Ditch Company is a corporation organized and existing under the laws of the State of Nevada, and has its principal place of business in Lyon County, Nevada, and within said district of Nevada.

2. That the defendant, the Rickey Land and Cattle Company, is a corporation organized and existing under the laws of the State of Nevada, and has

its principal place of business at Carson City, in the County of Ormsby and State of Nevada and within said District of Nevada, and is a citizen of the State of Nevada.

3. That on the tenth day of June, 1902, Miller & Lux, a corporation organized and existing under the laws of the State of California, and having its principal place of business at San Francisco, California, and a citizen of the State of California, exhibited to and filed in this court its bill of complaint against one Thomas B. Rickey and against your orator and against many other persons; which suit is number 731 on the equity docket of this court.

4. That thereafter on the said tenth day of June, 1902, this court duly issued its writ of subpoena in said suit upon said bill of complaint directed to the said Thomas B. Rickey, your orators and the other persons made defendants by said bill; and thereafter in the said tenth day of June, 1902, said writ of subpoena was duly served by the marshal of this district upon the said Thomas B. Rickey, and was thereafter served upon your orators and upon the other defendants in said suit.

5. That thereafter the said Thomas B. Rickey entered his appearance in said suit and thereafter filed in this court his plea to the jurisdiction of said court, which plea was overruled by this Court and the said Thomas B. Rickey was by this Court ruled to answer to said bill of complaint and he has answered the same.

6. That your orators and the other defendants in said suit have entered appearances in said suit; and said suit is now pending and undetermined in this court as to all of the defendants thereto.

7. That in and by the said bill of complaint the said Miller & Lux (complainant therein) alleged, among other things, that it then was, and for a long time prior thereto had been, the owner, seised in fee and in the actual possession of certain lands situated in the County of Lyon, State of Nevada, in said district of Nevada, in said bill particularly enumerated and described; and further alleged that there is a certain natural stream and watercourse known as Walker River which flows, and from time immemorial has flowed, to, over and upon the said lands, and that said lands include the banks, bed and stream of said river; and further alleged that at divers times therein set forth, the said Miller and Lux, its grantors and predecessors in interest at first appropriated and diverted from said river portions of the waters of said river amounting in all to a flow of nine hundred and forty-three and twenty-nine hundredths (943.29) cubic feet of water per second and that it and they had carried the same from said river to and upon certain lands and used the same for the irrigation thereof, and that the said Miller & Lux was then the owner by such appropriation of certain interests in said appropriated water therein particularly set forth and enumerated; and further alleged that with-

in three years next before the filing of said bill the defendants thereto, including the said Thomas B. Rickey, and your orators, had, and that each of them had diverted the waters of said Walker River at divers places on said river above the said lands of said Miller & Lux and above the points at which the said Miller & Lux so diverts said water, and that a large portion of said water so diverted by the defendant in said suit, is never returned to said river and that said defendants to said suit are continuing the diversions aforesaid and have thereby deprived and are depriving the said Miller & Lux of a large portion of said water to which the said Miller & Lux is so entitled; and further alleged that each of said diversions so made by the defendants to said suit is without right, but that they have so diverted said water and are so diverting the same under a claim of right so to do, and adversely to the said Miller & Lux; and further alleged that by the diversions aforesaid the said Miller & Lux has been deprived and is being deprived of sufficient water to irrigate its lands aforesaid, and is thereby rendered unable, and so long as said diversions are continued, will be unable to irrigate its said lands which it had theretofore been accustomed to irrigate, and is thereby rendered unable and will be unable to properly or successfully cultivate the said lands or to raise crops thereon, and further alleged that if the defendants to said suit, or either of them, has any right to divert any

water from the said river, said rights and each of them are subsequent and subordinate to the aforesaid appropriations so made by the said Miller & Lux, its grantors and predecessors in interest; and further alleged that the matter in dispute in said suit, to wit, the said rights of the said Miller and Lux, so infringed by the said acts of the defendants to said suit exceeds, exclusive of interest and costs, the value of two thousand dollars ($2,000).

8. That in and by the said bill of complaint, the said Miller & Lux, among other things, pray that the defendants to said suit, including the said Thomas B. Rickey, and your orators be forever enjoined and restrained from diverting any water from the said Walker River above the points where the said Miller & Lux so divert the same in said manner or to said extent as to deprive your orators of any of the water aforesaid and also for general relief.

9. That thereafter, to wit, on the sixth day of August, 1902, and after the filing of the said bill of complaint, and after the service upon the said Thomas B. Rickey of the writ of subpoena in said suit, and after the said Thomas B. Rickey had appeared therein the said Thomas B. Rickey caused the defendant, the Rickey Land and Cattle Company to be organized and incorporated and it was on that day organized and incorporated under the laws of the State of Nevada.

10. Upon and according to his information and

belief your orators aver that the only person really interested in said corporation defendant, or really owning any of the stock thereof is the said Thomas B. Rickey and that the other persons forming the said corporation and holding stock thereof are only nominees of the said Thomas B. Rickey and hold their said stock solely for him and for his benefit.

11. That as your orators are informed and believe, the said Thomas B. Rickey, at the time of the commencement of the suit aforesaid was the owner and had, for a long time theretofore been the orator of certain lands situated on the said Walker River and on certain branches or tributaries thereof, and was diverting certain water from the said Walker River and from the said branches and tributaries thereof, for the irrigation of his said lands and claiming the right so to do.

12. That after the said incorporation and organization of the said Rickey Land and Cattle Company, the defendant herein, the said Thomas B. Rickey conveyed to said corporation all his lands aforesaid and all the rights owned or claimed by him to divert any water from said Walker River and the said defendant corporation has ever since claimed to be the owner of said lands and water rights.

13. That thereafter, to wit, on the 15th day of October, 1904, the said defendant, the Rickey Land and Cattle Company, commenced an action in the Superior Court of the County of Mono, State of Cali-

fornia, against your orators and against a large number of persons, which action is numbered 1055 on the register of said Superior Court.

14. That said action was commenced by said defendant as plaintiff therein, by the filing of a complaint in and by which the said defendant (plaintiff therein) alleged, among other things, that it is and had been since the 6th day of August, 1902, the owner, in the possession and entitled to the possession of certain of the lands so conveyed to it by the said Thomas B. Rickey, and further alleged that the said lands constituted one entire contiguous body of land over, through and upon which flows and from time immemorial has flowed a certain branch or tributary of said Walker River called the West Fork of the Walker River, and that said lands and all thereof are and from time immemorial have been riparian to said west fork of said river and situated along and bordering thereupon; and further alleged that the said defendant (plaintiff therein) is the owner in the possession of and entitled to the possession, use and enjoyment of, and has the right to divert and appropriate all the waters of the said west fork of said Walker River and its tributaries in the State of California of the extent of a constant flow of fifteen hundred and seventy-five (1575) cubic feet of water per second; and further alleged that the said Walker River is and from time immemorial has been a natural stream or watercourse having its source in two branches known

as the East Fork of the Walker River and the West Fork of the Walker River and that both of said branches have their sources in the State of California, and from thence flow through the eastern part of the said State of California into and through the western part of the State of Nevada and that said two branches of said Walker River unite in said State of Nevada; and further alleged that the defendants in said action and each of them, including your orators, claims some right, title and interest adverse to the defendant herein (plaintiff therein) in and to said constant flow of fifteen hundred and seventy-five (1575) cubic feet of water per second, or some part or portion thereof in the West Fork of the Walker River, that said right, title and interest so claimed by said defendants and each of them including your orators, in and to said water is without right, and that all claims of them and each of them to the waters of said West Fork of said Walker River are subordinate and subject to the said alleged ownership of the defendant herein (plaintiff therein) and its alleged right to divert and appropriate from said West Fork of said Walker River a constant flow of fifteen hundred and seventy-five (1575) cubic feet of water per second.

15. That in and by said complaint the defendant herein (plaintiff therein) prayed, among other things, that the said Superior Court should adjudge that the defendant herein (plaintiff therein) is the

owner in the possession, use and enjoyment and entitled to the possession, use and enjoyment of and has the right to appropriate and divert all the waters of the said West Fork of the said Walker River in the State of California to the extent of a constant flow of fifteen hundred and seventy-five (1575) cubic feet of water per second, and that said Court further adjudge that neither of the defendants therein, including your orators, has any right, title, interest, claim or estate in or to any of the waters flowing or which may hereafter flow in the said West Fork of the said Walker River in the State of California, when the quantity of water therein flowing is less than fifteen hundred and seventy-five (1575) cubic feet of water per second, and that it be further adjudged that the said defendants and each of them, including your orators, are estopped to claim or assert against the defendant herein (plaintiff therein), its grantees, successors or assigns any right, title, claim, interest or estate in or to any of the waters now flowing or which may hereafter flow in said West Fork of said Walker River in the State of California, when the quantity of water therein flowing is less than fifteen hundred and seventy-five (1575) cubic feet of water per second, and also for general relief.

16. That in the said 15th day of October, 1904, the defendant herein as plaintiff, commenced another action in said Superior Court of said county of Mono, State of California, against your orators and against

a large number of other persons which is numbered 1056 on the register of said court.

17. That said action was commenced by said defendant as plaintiff therein, by filing a complaint in and by which the said defendant (plaintiff herein), alleged among other things, that it is and has been since the sixth day of August, 1902, the owner in possession and entitled to the possession of the rest of the lands aforesaid so conveyed to it by the said Thomas B. Rickey; and further alleged that the said lands constitute one entire contiguous body of land through and upon which flows, and from time immemorial has flowed, certain branch or tributary of said Walker River called the East Fork of the Walker River and that said lands and all thereof are and from time immemorial have been riparian to said east fork and said river and situated along and bordering thereupon; and further alleged that the said defendant (plaintiff herein) is the owner in the possession of and entitled to the possession, use and enjoyment of and has the right to divert and appropriate all the waters of the said East Fork of said Walker River and its tributaries in the State of California to the extent of a constant flow of fifteen hundred and four (1504) cubic feet of water per second; and further alleged that the said Walker River is, and from time immemorial has been, a natural stream or watercourse having its source in two branches known as the East Fork of the Walker River and the

West Fork of the Walker River, and that both of said branches have their sources in the State of California and from thence flowed through the western part of the State of Nevada, and that said two branches of said Walker River unite in said State of Nevada; and further alleged that the defendants in said action and each of them, including your orators, claim some right, title and interest adverse to the defendants herein (plaintiff therein) in and to said constant flow of fifteen hundred and four (1504) cubic feet of water per second, or some part or portion thereof in the East Fork of the Walker River, and that said right, title and interest so claimed by said defendants and each of them, including your orators, in and to said water is without right and that all claims of them and each of them to the waters of said East Fork of the said Walker River are subordinate and subject to the said alleged ownership of the defendant herein (plaintiff therein) and its alleged right to divert and appropriate from said East Fork of said Walker River a constant flow of fifteen hundred and four (1504) cubic feet of water per second.

18. That in and by said complaint the defendant herein (plaintiff therein) pray, among other things, that the said Superior Court should adjudge that the defendant herein (plaintiff therein) is the owner in the possession, use, enjoyment, and entitled to the possession, use and enjoyment of and has the right to appropriate and divert all the waters of the said

east fork of the said Walker River in the State of California to the extent of a constant flow of fifteen hundred and four (1504) cubic feet of water per second; and that said court further adjudge that neither of the defendants herein, including your orators, has any right, title, interest, claim or estate in or to any of the waters flowing or which may hereafter flow in the said East Fork of the said Walker River in the State of California when the quantity of water therein flowing is less than fifteen hundred and four (1504) cubic feet of water per second, and that it be further adjudged that the said defendants and each of them, including your orators, are estopped to claim or assert against defendant herein (plaintiff therein) its grantees, successors or assigns any right, title, claim, interest or estate in or to any of the waters now flowing or which may hereafter flow in said East Fork of said Walker River in the State of California, when the quantity of water therein flowing is less than fifteen hundred and four (1504) cubic feet of water per second; and also for general relief.

19. That on the 5th day of January, 1905, your orators filed in this court in the said suit so brought by the said Miller & Lux against the said Thomas B. Rickey and others, number 731, their cross-bills in and by which cross-bills the said cross-complainants alleged, among other things, that they were and for a long time prior thereto had been, the owners of certain rights in the waters of the said Walker River

and certain appropriations therein made by them, their grantors and predecessors in interest, and further alleged that within three years next before the filing of said cross-bills said Thomas B. Rickey had diverted the waters of said Walker River at divers places on said river above the lands of said cross-complainants and above the points at which said cross-complainants so diverted the same; that a large portion of said water so diverted by the said Thomas B. Rickey is never returned to said river and that he is continuing the diversions aforesaid and has thereby deprived and is depriving the said cross-complainants of a large portion of said water to which they are so entitled; that each of said diversions so made by the said Thomas B. Rickey is without right, but that he has so diverted said water and is so diverting the same under claim of right so to do, and adversely to said cross-complainant; and therein and thereby the said cross-complainant prayed, among other things, that the said Thomas B. Rickey be forever enjoined and restrained from diverting any water from said Walker River above the points where the said cross-complainant diverts the same in said manner or to such extent as to deprive said cross-complainant of any of the water aforesaid, and also for general relief.

20. That thereafter on the 5th day of January, 1905, this court duly issued its writ of subpoena in said cross-suits upon said cross-bill directed to said

Thomas B. Rickey and thereafter on the said 5th day of January, 1905, the said writ of subpoena was duly served by the marshal of this district upon said Thomas B. Rickey.

21. That upon the filing of said second complaint in said Superior Court there was issued out of said court in each of said actions a writ of summons thereupon which is the appropriate process under the laws of the State of California for obtaining jurisdiction over the persons of the defendants in an action; and thereafter, to wit, on the 7th day of January, 1905, and after the service of the said writ of subpoena upon the said Thomas B. Rickey, the said writ of summons was served upon your orators.

22. That under the laws of the State of California an action is commenced in the courts of that State merely by the filing of a complaint and that from and after the filing of said complaint said action is deemed to be pending in the court in which said complaint is filed.

23. That the issues tendered by said complainants in said two actions so brought by the defendant herein as plaintiff, against your orators and said other persons, are so far as concerns your orators, the same issues which were tendered by the said cross-bill of complaint of your orator so filed in this court, so far as the same related to the defendant, Thomas B. Rickey, in said suits.

24. That at the time of the filing by the said defendant herein of its complaint aforesaid the said defendant did not have or claim to have and does not now have or claim to have, any right whatever in or to any of the waters of said Walker River or of any branch or tributary thereof, except such rights, if any, as it acquired by said conveyance to it from the said Thomas B. Rickey.

25. That the defendant herein in and by the actions aforesaid, intended and the necessary effect of said actions is to bring on for trial and determination in said Superior Court the same issues presented by the said cross-bills of complaint of your orators in the said suit so brought in this court, so far as relates to the issues between your orator and the said Thomas B. Rickey, and to obtain from said Superior Court a judgment determining said issues in advance of the determination of the same by this court and thereby to defeat the jurisdiction of this court in the said suit so now pending before it and to hinder and embarrass this court in the trial of said issues and in the enforcement of any decree which this Court may render in the said suit so pending before it; a further prosecution of said actions or either of them as against your orators would therefore be in derogation of the jurisdiction of this court and of the rights of your orators in the cross-suit so brought by him in this court and now pending therein.

26. That the matter in dispute herein, to wit, the right of your orators to maintain their cross-suit

aforesaid without hindrance from or interference by any other court exceeds, exclusive of interest and costs, the sum of two thousand dollars ($2,000).

And your orators allege that all of the said acts, doings and claims of the said defendant herein are contrary to equity and good conscience and tend to the manifest wrong, injury and oppression of your orators herein. In consideration whereof and for as much as your orators are remediless in the premises at and by the strict rules of the common law and can have relief only in a court of equity where matters of this kind are properly cognizable and relievable, to the end therefore that your orators may have that relief which he can attain only in a court of equity, and that the said defendant may answer the premises, but not upon oath or affirmation, the benefit whereof is expressly waived by your orators, and that the said defendant, its agents, servants and attorneys and all persons acting in aid of them or either of them, be enjoined and restrained from further prosecuting as against your orators either of the actions so brought by it in the said Superior Court of the County of Mono, State of California, and from taking any further step whatsoever in either of said actions as against your orators, and that your orators may have such further or other relief as the nature of the case may require and to your Honors may seem meet, may it please your Honors to grant unto your orators a writ of subpoena to be directed to said defendant the Rickey Land and Cattle Company, a

corporation, commanding it at a certain time and under a certain penalty therein to be limited, personally to appear before this Honorable Court and then and there full, true, direct and perfect answer make to all and singular the premises and fully to stand to perform and by such further order, direction and decree therein as to this Honorable Court shall seem meet.

And may it further please your Honors during the pendency of this suit to issue your writ of injunction enjoining and restraining the said defendant, its agents, servants and attorneys and all persons acting in aid of them or either of them, during the pendency of this suit and until the further order of the Court from prosecuting as against your orators, either of the actions so brought by it in the said Superior Court of the County of Mono, State of California, and from taking any further step whatsover in either of said actions as against your orators.

And may it further please your Honors to make and issue an order requiring the said defendant the Rickey Land and Cattle Company, to show cause before this Honorable Court at a time and place therein fixed, why said writ of injunction pendente lite as above prayed for, should not be issued and at the same time and as a part of said order to issue your temporary restraining order enjoining and restraining the said defendant, its agents, servants and attorneys and all persons acting in aid of them or either of them until the hearing of said order to

show cause and until the further order of this Court, from doing all or any of the acts aforesaid.

JAMES NICHOL.
ANGUS McLEOD.
DEWITT CROWNINSHIELD.
C. F. MEISSNER.
J. F. HOLLAND.
THOS. HALL.
D. J. BUTLER.
JOHN COMPSTON.
A. W. GREEN.
F. FEIGENSPAN.
MARY T. SHAW.
M. J. GREEN.
HAMILTON WISE.
C. F. HOLLAND.
E. S. CROSS.
J. S. SWEETMAN.
J. C. MILLS.
SPRAGG-WOODCOCK DITCH CO.
Complainants.
By J. W. SIMPSON,
Agent.
By C. E. MACK,
Solicitor.

MACK & FARRINGTON, and
GEO. S. GREEN,
Solicitors for Complainants.

State of Nevada,
County of Washoe,
District of Nevada,—ss.

J. W. Simpson, being first duly sworn, deposes and says, that he is the duly authorized agent of the complainants above named and that all of the complainants live away from where the court above named is held, and scattered through Lyon, Esmeralda and other counties of Nevada; that their signatures and affidavits to the foregoing bill of complaint cannot be had in time to file the complaint before the court takes recess; that he has read the foregoing bill of complaint and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated on information and belief and that as to those matters he believes it to be true.

J. W. SIMPSON.

Subscribed and sworn to before me this 27th day of January, 1905.

[Seal] C. E. MACK,
Notary Public.

[Endorsed]: No. 796. In Equity. In the Circuit Court of the United States, Ninth Circuit, District of Nevada. James Nichol, et al., Complainants, vs. The Rickey Land and Cattle Company, a Corporation, Defendant. Bill of Complaint. Filed January 28, 1905. T. J. Edwards, Clerk. Mack & Far-

rington and Geo. S. Green, Solicitors for Complainants.

Subpoena Ad Respondendum.

No. 796.

UNITED STATES OF AMERICA.

In the Circuit Court of the United States, Ninth Circuit, District of Nevada.

IN EQUITY.

The President of the United States of America, Greeting, to the Rickey Land and Cattle Company, a Corporation:

You are hereby commanded that you be and appear in said Circuit Court of the United States aforesaid, at the courtroom in Carson City, Nevada, on the 6th day of March, A. D. 1905, to answer to a bill of complaint exhibited against you in said court by James Nichol, F. Feigenspan, Angus McLeod, Mary T. Shaw, Dewitt Crowninshield, M. J. Green, C. F. Meisner, Hamilton Wise, J. F. Holland, C. F. Holland, Thos. Hall, E. S. Cross, D. J. Butler, J. S. Sweetman, John Compston, J. C. Mills, A. W. Green, Spragg-Woodcock Ditch Co., a corporation, who are citizens of the State of Nevada, and to do and receive what the said court shall have considered in that behalf. And this you are not to omit under the penalty of $250.00.

Witness, the Honorable MELVILLE W. FULLER, Chief Justice of the Supreme Court of the United States, this 28th day of January, in the year of our Lord one thousand nine hundred and five, and of our Independence the 129th.

[Seal] T. J. EDWARDS,
Clerk.

Memorandum Pursuant to Rule 12, Supreme Court, U. S.

You are hereby commanded to enter your appearance in the above suit, on or before the first Monday of March next, at the clerk's office of said court, pursuant to said bill; otherwise the said bill will be taken against you pro confesso.

T. J. EDWARDS,
Clerk.

Return.

United States of America,
District of Nevada,—ss.

I hereby certify and return that I served the annexed subpoena ad respondendum on the therein named The Rickey Land and Cattle Company, a corporation, by handing to and leaving a true and correct copy thereof with Thomas B. Rickey, President, Rickey Land and Cattle Company, personally, at

Carson City, Nevada, in said district on the 28th day of January, 1905.

ROBERT GRIMMON,
U. S. Marshal.
By L. Stern,
Deputy.

1 service—$4.00.

[Endorsed]: No. 796. In Equity. In the Circuit Court of the United States, Ninth Circuit, District of Nevada. James Nichol et al., Complainants, vs. The Rickey Land and Cattle Company, Defendant. Subpoena ad Respondendum. Filed February 2, 1905. T. J. Edwards, Clerk. Mack & Farrington, and Geo. S. Green, Solicitors for Complainants.

In the Circuit Court of the United States, Ninth Circuit, District of Nevada.

No. ——.

JAMES NICHOL, F. FEIGENSPAN, ANGUS McLEOD, MARY T. SHAW, DEWITT CROWINSHIELD, M. J. GREEN, C. F. MEISNER, HAMILTON WISE, J. F. HOLLAND, C. F. HOLLAND, THOS. HALL, E. S. CROSS, D. J. BUTLER, J. S. SWEETMAN, JOHN COMPSTON, J. C. MILLS, A. W. GREEN, and SPRAGG-WOODCOCK DITCH COMPANY (a Corporation),

Complainants,

vs.

THE RICKEY LAND AND CATTLE COMPANY (a Corporation),

Defendant.

Order to Show Cause why Injunction Pendente Lite Should not Issue.

Good cause appearing by the verified bill of complaint of James Nichol, F. Feigenspan, Angus McLeod, Mary T. Shaw, Dewitt Crowninshield, M. J. Green, C. F, Meisner, Hamilton Wise, J. F. Holland, C. F. Holland, Thos. Hall, E. S. Cross, D. J. Butler, J. S. Sweetman, John Compston, J. C. Mills, A. W. Green and Spragg-Woodcock Ditch Company, a corporation, complainants, on file herein, it is ordered

that the said defendant, the Rickey Land and Cattle Company, a corporation, show cause before this court on the 13th day of March, 1905, at the hour of ten o'clock A. M., at the courtroom at Carson City, Nevada, why an injunction should not issue pending this suit, according to the prayer of said bill.

And it further appearing to the Court that there is danger of irreparable injury from delay, it is therefore further ordered that until the hearing and determination of said motion for injunction and until the further order of this Court the said defendant, the Rickey Land and Cattle Company, a corporation, its agents, servants and attorneys and all persons acting in aid of them, or either of them, be and they are hereby enjoined and restrained from further prosecuting as against said complainants, that certain action brought on the 15th day of October, 1904, by the Rickey Land and Cattle Company as plaintiff against Miller & Lux, a corporation, said complainants, and others as defendants in the Superior Court of the County of Mono, State of California.

And it is further ordered that a copy of this order be served upon the said corporation defendant and on one of its attorneys (namely on either Mr. James F. Peck, or Mr. Charles C. Boynton, or Mr. William O. Parker) on or before the 6 day of Feb., 1905. And that a bond in the sum of $1,000 be filed herein by complainant before said order issue.

THOMAS P. HAWLEY,
Judge.

Return.

United States of America,
District of Nevada,—ss.

I hereby certify and return that I served the annexed order to show cause on the therein named Rickey Land and Cattle Company, by handing to and leaving a true and correct copy thereof with Thos. B. Rickey, its president, personally, at Carson City, Nevada, in said district, on the 28th day of Jan., 1905.

I further return that I mailed a copy of the said order to show cause to Peck & Boyton, said T. B. Rickey's attorneys, room 304, Mills Building, San Francisco, Cal., on the 30th day of January, 1905.

ROBERT GRIMMON,
U. S. Marshal.
By L. Stern,
Deputy.

1 service—$4.00.

Carson City, Nevada, January 31, 1905.

[Endorsed]: No. 796. In Equity. In the Circuit Court of the United States, Ninth Circuit, District of Nevada. James Nichol, et al., Complainants, vs. The Rickey Land and Cattle Company, a Corporation, Defendant. Order to Show Cause Why Injunction Pendente Lite Should Not Issue. Filed February 2, 1905. T. J. Edwards, Clerk. Mack & Farrington, and Geo. S. Green, Solicitors for Complainants.

In the Circuit Court of the United States, Ninth Circuit, District of Nevada.

No. 796.

JAMES NICHOL, F. FEIGENSPAN, ANGUS McLEOD, MARY T. SHAW, DeWITT CROWNINSHIELD, M. J. GREEN, C. F. MEISSNER, HAMILTON WISE, J. F. HOLLAND, C. F. HOLLAND, THOS. HALL, E. S. CROSS, D. J. BUTLER, J. S. SWEETMAN, JOHN COMPSTON, J. C. MILLS, A. W. GREEN and SPRAGG-WOODCOCK DITCH COMPANY (a Corporation),

Complainants,

vs.

THE RICKEY LAND AND CATTLE COMPANY (a Corporation),

Defendant.

Affidavit of Thomas B. Rickey.

State of Nevada,
County of Ormsby,—ss.

Thomas B. Rickey, being duly sworn, deposes and says: That he is one of the defendants in the bill of complaint in the action commenced herein, No. 731, wherein Miller & Lux, a corporation, is complainant, and Thomas B. Rickey, and others, are defendants;

and that he is, and since its organization has been, the president of the Rickey Land and Cattle Company, a corporation, defendant herein; that he is not now, nor has he at any time since the organization of said corporation, been the manager of said corporation; that the manager of said corporation is, and at all times since the organization has been, one Charles Rickey, and that the active management of the said corporation and its affairs, has been conducted by the said Charles Rickey.

That in each of the actions mentioned herein as having been commenced by the said Rickey Land and Cattle Company in the county of Mono, State of California, a summons addressed to the defendants in said actions respectively was issued out of said court in due form, as required by the laws of the State of California. That after the date of the issuance of said summons, and prior to the 28th day of December, 1904, the said summons so issued in said suits commenced in said Mono county, State of California, were served upon each of the defendants named in said suits, who are complainants herein. That each of said complainants herein, defendants in said actions so commenced in said Mono county, State of California, has appeared in said actions so commenced in said Mono county, State of California, and filed his and its demurrer to the complaints in said actions, stating as grounds of demurrer that the complaint did not state facts constituting a cause of

action, and that the Court did not have jurisdiction; and the said Superior Court of the said county of Mono, State of California, has, since the 28th day of December, 1904, had jurisdiction of each of said complainants herein, as defendants in said actions so commenced in said county of Mono, with full power and jurisdiction to adjudge all the rights of said complainants herein as against the cause of action and rights alleged by the Rickey Land and Cattle Company, a corporation, in the complaints in said actions so commenced in said county of Mono. That by the laws of the State of California, an action is commenced in the Superior Courts of said State when the complaint is filed in said courts. That by the laws of the State of California, it is provided: "The clerk must endorse on the complaint the day, month and year, that it is filed, and at any time within one year thereafter, the plaintiff may have a summons issued, and if the action be brought against two or more defendants who reside in different counties, may have a summons issued for each of such counties at the same time. But at any time within the year after the complaint is filed, the defendant may, in writing, or by appearing and answering, or demurring, waive the issuing of summons; or, if the action be brought upon a joint contract of two or more defendants, and one of them has appeared within the year, the other or others, may be served or appear after the year, at any time before trial. 'The sum-

mons must be directed to the defendant, signed by the clerk, and issued under the seal of the Court, and must contain: 1. The names of the parties to the action, the court in which it is brought, and the county in which the complaint is filed. 2. A direction that the defendant appear and answer the complaint within ten days, if the summons is served within the county in which the action is brought; within thirty days, if served elsewhere. 3. A notice, that, unless the defendant so appears and answers, the plaintiff will take judgment for any money or damages demanded in the complaint as arising upon contract, or will apply to the Court for any other relief demanded in the complaint. The style of all process shall be: 'The People of the State of California,' and all prosecutions shall be conducted in their name and by their authority. The summons may be served by the sheriff of the county where the defendant is found, or by any other person over the age of eighteen, not a party to the action. A copy of the complaint must be served with the summons upon each of the defendants. When the summons is served by the sheriff, it must be returned, with his certificate, of its service, and of the service of any copy of the complaint, where such copy is served, to the office of the clerk from which it is issued. When it is served by any other person, it must be returned to the same place with an affidavit of such person of its service, and of the service of a

copy of the complaint, where such copy is served. The summons must be served by delivering a copy thereof, as follows: 1. If the suit is against a corporation formed under the laws of this State, to the president or other head of the corporation, secretary, cashier, or managing agent thereof. 2. If the suit is against a foreign corporation or a nonresident joint stock company, or association, doing business and having a managing or business agent, cashier, or secretary within this State; to such agent, cashier, or secretary. 3. If against a minor under the age of fourteen years, residing within this State, to such minor, personally, and also to his father, mother, or guardian; or, if there be none within this State, then to any person having the care or control of such minor, or with whom he resides, or in whose service he is employed. 4. If against a person residing within this State, who has judicially declared to be of unsound mind, or incapable of conducting his own affairs, and for whom a guardian has been appointed; to such person, and also to his guardian. 5. If against a county, city or town; to the president of the board of supervisors, president of the council or trustees, or other head of the legislative department thereof. 6. In all other cases, to the defendant personally." It is provided by the laws of the State of California, in section 412, of the Code of Civil Procedure of said State, as follows: "Where the person on whom service is to be made resides out of the

State; or has departed from the State; or cannot, after due diligence, be found within the State, or conceals himself to avoid the service of summons; or is a foreign corporation having no managing or business agent, cashier or secretary, within the State, and the fact appears by affidavit to the satisfaction of the Court, or a Judge thereof; and it also appears by such affidavit, or by the verified complaint on file, that a cause of action exists against the defendant in respect to whom the service is to be made, or that he is a necessary or proper party to the action; or when it appears by such affidavit, or by the complaint on file herein, that it is an action which relates to or the subject of which is real or personal property in this State, in which such person defendant or foreign corporation defendant has or claims a lien or interest, actual or contingent, therein, or in which the relief demanded consists wholly or in part in excluding such person or foreign corporation from any interest therein, such court or Judge may make an order that the service be made by the publication of the summons." It is provided by the laws of the State of California, in section 413 of the Code of Civil Procedure, of said State, as follows: "The order must direct the publication to be made in a newspaper, to be designated, as most likely to give notice to the person to be served, and for such length of time as may be deemed reasonable, at least once a week; but publication against a defendant residing out of the

State, or absent therefrom, must not be less than two months. In case of publication, where the residence of a nonresident or absent defendant is known, the Court or Judge must direct a copy of the summons and complaint to be forthwith deposited in the post-office, directed to the person to be served, at his place of residence. When publication is ordered, personal service of a copy of the summons and complaint out of the State is equivalent to publication and deposit in the postoffice, and in either case the service of the summons is complete at the expiration of the time prescribed by the order for publication."

It is provided by the laws of the State of California, in section 749, of the Code of Civil Procedure of said State, as follows: "Service may be made by publication in actions relating to or the subject of which is real property in this State, when any defendant has or claims any adverse interest or estate therein, and where the person on whom the service is to be made resides outside of the State, or cannot, after due diligence, be found within the State, or conceals himself to avoid the service of summons, or is a foreign corporation having no managing or business agent, cashier, or secretary within the State, and the fact appearing by affidavit, to the satisfaction of the Court or Judge thereof, and it also appearing by such affidavit, or by the verified complaint on file, that a cause of action exists against the defendant in respect to whom the service is to be made, or that he is

a necessary or proper party to the action, such judge may make an order that the service be made by publication of summons. Service by publication, and proof of service of a copy of the summons and complaint in actions under this title shall be sufficient, if made in accordance with sections four hundred and thirteen and four hundred and fifteen of this code." It is provided by the laws of the State of California in section 416 of the Code of Civil Procedure of said State, as follows: "From the time of the service of the summons and of a copy of the complaint in a civil action, where service of a copy of the complaint is required, or of the completion of the publication when service by publication is ordered, the Court is deemed to have acquired jurisdiction of the parties, and to have control of all the subsequent proceedings. The voluntary appearance of a defendant is equivalent to personal service of the summons and copy of the complaint upon him."

It is provided by the laws of the State of California, in section 738 of the Code of Civil Procedure of said State, as follows:

"An action may be brought by any person against another who claims an estate or interest in real property, adverse to him, for the purpose of determining such adverse claim; provided, however, that whenever in an action to quiet title to, or to determine adverse claims to, real property, the validity of any gift, devise, or trust, under any will, or instrument pur-

porting to be a will, whether admitted to probate or not, shall be involved, such will or instrument purporting to be a will is admissible in evidence; and all questions concerning the validity of any gift, devise, or trust therein contained, save such as under the constitution belong exclusively to the probate jurisdiction shall be finally determined in such action; and provided, however, that nothing herein contained shall be construed to deprive a party of the right to a jury trial in any case, where, by the law, such right is now given." That by the laws of the State of California, the summons issued in the Superior Court is the process, by the service of which the Superior Courts of said State acquire jurisdiction of defendants in actions therein, where the action is not an action in rem. That under the laws of the State of California, a person or corporation may commence and prosecute an action to final judgment in the Superior Court of said State to quiet and determine his or its title to real estate and water, and the use of water, flowing in the streams in said State, against any person or corporation claiming an adverse interest or title to such real estate, or to such water, or to such use of water. That in said actions so commenced in the Superior Court of Mono County, after the issuance of said summons therein, and before the 28th day of October, 1904, an affidavit was filed in said action in said Mono County on behalf of plaintiff in said action showing

and affirming that the said individual complainants herein did not reside in the State of California, and that said individual complainants reside in the State of Nevada; and in said affidavit the postoffice addresses and residences of each of said individual complainants herein, who were defendants in said actions, were stated, and it was further in said affidavit stated and affirmed that the residence and principal place of business of each of said corporations complainants herein, was at Yerington, Lyon County, in the State of Nevada, together with a statement and affirmation as to the names of the respective presidents of each of said corporations, complainants herein, and together with a statement and affirmation of the names of the respective secretaries of each of said corporations, and the respective places of residence and postoffice addresses of each of said presidents and secretaries of said corporations, complainants herein. And it was further stated in said affidavit in said actions that neither of said corporations, complainants herein, had a managing or business agent, cashier, or secretary within the State of California; and it was also stated in said affidavit, and made to appear therein, that a cause of action existed against each of said defendants in said actions, who are complainants herein; and it was further stated and made to appear in said affidavits so filed in each of said actions, that each of said defendants therein, who are complainants herein, was a

necessary and proper party to the action commenced in Mono County; and it was further made to appear, and was stated in said affidavits so filed in each of said actions commenced in Mono County, that each of the actions so commenced in Mono County related to, and the subject of each of said actions was real property in the State of California, in which such persons, defendants therein, who are complainants herein, and foreign corporations, defendants therein, who are complainants herein, claim a lien and interest in said real property, and that the relief demanded in said actions in Mono County, consists wholly in excluding such persons, defendants therein, who are complainants herein, and foreign corporations, defendants therein, who are complainants herein, from any interest in said real property to which such actions in Mono County relate, and which is the subject of said actions. That the complaint in each of said actions so commenced in the said Superior Court was verified as required by the laws of the State of California, in order to constitute a verified complaint within the meaning of said section 412 of the Code of Civil Procedure of said State. That after the presentation and filing of said affidavit, the said Superior Court of Mono County, State of California, by its order duly given and made in each of said actions, directed that the service of summons in each of said actions be made by the publication thereof, and by said order in each of said actions,

the said Superior Court of Mono County, directed the publication of the summons issued in each of said actions to be made in a newspaper designated in said order as the newspapers most likely to give notice to the person to be served with said summons, and provided in said order that the said summons should be published at least once a week for two successive months; and the Court in said order directed that a copy of the summons, and a copy of the complaint in each of said actions, be forthwith deposited in the postoffice, directed to each of the persons to be served at his place of residence; and further, in each of said orders directed that a copy of the summons and complaint be forthwith deposited in the postoffice, directed to the persons named in said affidavit, as the presidents and secretaries, respectively, of said corporations, at the place of residence of said persons, and that the same be directed to said named persons as such presidents, and as such secretaries; and it was also further provided in each of said orders that a copy of the summons and a copy of the complaint be forthwith deposited in the postoffice, directed to each of said corporations at its residence and principal place of business; and it was further in each of said orders directed, that the postage be prepaid on each of said copies of summons and copies of complaints so to be addressed and deposited in the postoffice. That after the making

of said order in each of said actions commenced in said Mono County, directing the publication and mailing of said copy of summons and said copy of complaint, and prior to December 28th, 1904, the plaintiff in said actions commenced in said Mono County, caused a copy of the summons in each of said actions, and a copy of the complaint in each of said actions to be personally served upon each of the individual complainants herein, and the said plaintiff in each of said actions in Mono County, prior to the 28th day of December, 1904, caused a copy of the summons in each of said actions, and a copy of the complaint in each of said actions to be delivered to the presidents of each of the said corporations, complainants herein, and to the secretaries of each of the corporations, complainants herein. That the said plaintiff in each of said actions in Mono County, after the making of said order directing the publication of said summons in each of said actions, caused the said summons in each of said actions to be published in the newspapers designated in said order, once a week for two months, and that said publication of said summons in each of said actions commenced on the 28th day of October, 1904; and said plaintiff forthwith after the making of said order in each of said actions commenced in Mono County, caused to be deposited in the United States postoffice a copy of the complaint, and a copy of the summons in each of said

actions, addressed to the defendants in said actions, who are complainants herein, at their respective places of residence, with the postage thereon prepaid, and caused a copy of said summons in each of said actions, and a copy of the complaint in each of said actions, to be deposited in the postoffice, and addressed to each of the presidents, and to each of the secretaries, as such, of each of said corporations, at the places of residence of said presidents and secretaries, respectively, with the postage thereon prepaid; and deposited in the United States postoffice a copy of the summons in each of said actions, and a copy of the complaint in each of said actions addressed to each of the corporations, complainants herein, at its residence and principal place of business. That affiant did not on the 6th day of August, 1902, or at any time thereafter, or at any time within two years prior thereto, claim any right to appropriate or divert the water of the east fork of the Walker River, or the west fork of the Walker River in the State of Nevada; but did for many years prior to the 6th day of August, 1902, divert and appropriate and use the waters of the East Fork of the Walker River, and the waters of the West Fork of the Walker River in the State of California, and claimed the right so to do; and did so divert and appropriate and use said water under such claim of right, and adverse to all the world. That the Rickey Land and Cattle Company, a corporation, was organized on the 24th day of July,

1902, by Thomas B. Rickey, the affiant, Charles W. Rickey and Alice B. Rickey, who were the incorporators and subscribers to the capital stock of said corporation; and the said corporation was not organized on the 6th day of August, 1902, by the affiant, and was at no time organized by the affiant, except in so far as he participated with those associated with him in the organization of said corporation. That the purposes for which said Rickey Land and Cattle Company was organized were, "To buy and sell and own and to reclaim farm and grass lands; to locate and buy and sell water and water rights, and to use the same for irrigation and mechanical purposes; to build and construct dams and reservoirs, and to store water therein for the purpose of irrigation and distribution, and sale; to buy and sell and raise all kinds of livestock, hay and grain, and to do all kinds of farming business, and to engage in all kinds of agricultural and dairy pursuits and business, and to engage in and to do a general merchandising business all in the States of California, Nevada, and elsewhere." That pursuant to the purposes expressed in said articles of incorporation the said corporation acquired by conveyance certain lands and certain water rights of said Thomas B. Rickey, the affiant, on the 6th day of August, 1902, part of which said lands are described in the complaints in said suits commenced in said Mono County, referred to in the complaint herein. That the said Rickey Land and Cattle

Company acquired by conveyance from said Thomas B. Rickey, all his right, title and interest to certain water rights, and rights to the use of water; and the said water rights, and rights to the use of water, are in part the water rights, and rights to the use of water described and mentioned in the said complaints in said actions commenced in Mono County; but the said water rights so acquired by the said Rickey Land and Cattle Company from the said Thomas B. Rickey, are not the same rights to water, and rights to the use of water alleged in said complaints in said Mono County in this, that since the conveyance of said lands by said Thomas B. Rickey, and said water rights, and the right to the use of water, to said Rickey Land and Cattle Company, which conveyance was made, executed and delivered on the 6th day of August, 1902, the Rickey Land and Cattle Company has at all times appropriated and diverted the water described in the said complaints in said actions commenced in said Mono County, for a beneficial purpose, and has used the same for a beneficial purpose, and has diverted, appropriated, and used such water adversely to all the world, and under a claim of right so to do, and has so diverted, appropriated and used such water continuously, uninterruptedly, notoriously, adversely, exclusively and peaceably.

That under the laws of the State of California, the adverse possession and use of water for a period of five years by the person or corporation claiming

the right to said water, and its grantors and predecessors in interest, confers a title, and right to the continued use of said water. By the laws of the State of California it is provided:

"Occupancy for any period confers a title sufficient against all except the State and those who have title by prescription, accession, transfer, will or succession. Occupancy for the period prescribed by the Code of Civil Procedure as sufficient to bar an action for the recovery of the property confers a title thereto, denominated a title by prescription, which is sufficient against all."

That Charles Rickey is now, and ever since the organization of said corporation has been the owner of, and entitled to all the rights, privileges and profits growing out of one hundred shares of the capital stock of said Rickey Land and Cattle Company; and that Alice B. Rickey is now, and ever since the organization of said corporation has been the owner of, and entitled to all the rights, privileges and profits growing out of one hundred shares of the capital stock of said Rickey Land and Cattle Company. That each of said persons, Charles Rickey and Alice B. Rickey, became owners of said stock by subscription to the capital stock of said corporation. That said Charles Rickey and Alice B. Rickey are, and at all times since the organization of said corporation have been in the absolute control of said stock, free from any right and interference,

management or direction of the said Thomas B. Rickey, affiant herein. And the said Charles Rickey and Alice B. Rickey have, and at all times since the organization of said corporation have had, the right to receive and have received, all the profits earned by said stock so owned and held by them, for their own use, benefit and enjoyment, and are subject therein to all burdens and liabilities attaching to the ownership of said stock. That the said Thomas B. Rickey, affiant herein, has no interest whatever, legal or equitable, in the said stock so owned and held by said Charles Rickey and said Alice B. Rickey. That the value of said stock so owned and held by said Charles Rickey and Alice B. Rickey is about forty thousand dollars. That the Rickey Land and Cattle Company, a corporation, mentioned in the complaint herein, is not a defendant in the original complaint filed in that certain action No. 731, referred to in the complaint herein, wherein Miller & Lux is complainant, and affiant and others are defendants; nor has the said corporation been made a party by any order of this Court. Affiant denies and says that it is not true that the only person really or at all interested in said corporation, the Rickey Land and Cattle Company, or really, or otherwise, owning any of the stock thereof, is the said affiant Thomas B. Rickey. And denies and says it is not true that the persons,

other than Thomas B. Rickey, affiant, forming the said corporation, the Rickey Land and Cattle Company, or holding the stock thereof, are only nominees of the said Thomas B. Rickey, or that they hold their said stock solely, or at all, for him, or for his benefit. That in the complaints in the actions commenced in Mono County, State of California, as alleged in the complaint herein, it is not alleged that the lands described in said complaints, or any of them, were conveyed to the plaintiff in said actions by the said Thomas B. Rickey, nor is any reference therein had to any conveyance or transfer by said Thomas B. Rickey to the said plaintiff in said action. Affiant denies and says that it is not true that the complainants James Nichol, F. Feigenspan, Angus McLeod, Mary T. Shaw, DeWitt Crowninshield, M. J. Green, C. F. Meissner, Hamilton Wise, J. F. Holland, C. F. Holland, Thos. Hall, E. S. Cross, D. J. Butler, J. S. Sweetman, John Compston, J. C. Mills, A. W. Green and Spragg-Woodcock Ditch Company, a corporation, or either of them, filed in this Court the cross-bills, or any cross-bills, alleged in the complaint herein, to have been filed but in this behalf alleges that the said so-called cross-bills were not brought as such, and were and are, original bills. Affiant denies and says that it is not true that the issues, or any issue tendered by such complaints in said two actions, or either of them, brought by the defendant, the Rickey Land

and Cattle Company, herein, as plaintiff in said actions, against the complainants herein and other persons, are, so far as concerns complainants herein, or either of them, the same issues, or any issue, which were tendered by the said alleged cross-bills or either of them, mentioned in the complaint herein so filed in this court.

Affiant denies that at the time of filing by the defendant, the Rickey Land and Cattle Company, herein, of its complaints in the Superior Court of the said county of Mono, State of California, or at any other time, the said defendant, the Rickey Land and Cattle Company, did not have or claim to have, or does not now have or claim to have any right in or to any of the waters of said Walker River, or of any branch or tributary thereof, except such right or rights, if any, as was acquired by said Rickey Land and Cattle Company by said conveyance alleged in the complaint herein to have been made, to wit, from the said Thomas B. Rickey, affiant herein. Denies and says that it is not true that the defendant herein, Rickey Land and Cattle Company, in and by the actions, or either of them, commenced in the said Superior Court of the County of Mono, State of California, intended, or that the necessary or any effect of said actions, or either of them, is to bring on for trial or determination in said Superior Court, the same issues, or any issue, presented by the said cross-bills, or either of

them, alleged to have been filed by the complainants herein in the said action, No. 731, wherein Miller & Lux is complainant, and the said affiant and others are defendants. And denies and says that it is not true that the defendant herein, Rickey Land and Cattle Company, intended, and that the necessary, or any effect of said actions commenced in said Superior Court of Mono County, is to obtain from said Superior Court a judgment determining the issues, or any of them, presented by the said cross-bills, or either of them, in said complaint mentioned, in advance of a determination of the same by this Court, or to do anything else therein, or to cause any other action to be taken by said court for the purpose of defeating, or which will defeat, the jurisdiction of this Court in the said suit alleged in complainants' complaint.

And the said affiant denies and says that it is not true that the defendant herein, Rickey Land and Cattle Company, intended, and that the necessary, or any, effect of said actions, or either of them, so commenced in the Superior Court of Mono County, is to hinder or embarrass or will hinder or embarrass, or that any action of said defendant in said Superior Court of Mono County, or any action of said Superior Court of Mono County in said actions, or either of them, will hinder or embarrass this Court in the trial of the issues, or any of them, in said suit, or in the enforcement of any decree which

this Court may render in the said suit so pending before it. And denies and says that it is not true that the further prosecution of said actions, or either of them, as against the complainants herein, or either of them, would be in derogation of the jurisdiction of this Court, or of the rights, or any right of the complainants, or either of them, in the cross suits alleged in the complaint herein. And in this behalf affiant alleges that the said actions so commenced in Mono County, and each of them, are brought in good faith, regardless of any effect they may have upon the said suit of Miller & Lux vs. T. B. Rickey and others, No. 731, in this cause, for the purpose of having and procuring a judgment quieting the title of said Rickey Land and Cattle Company to the said waters, water rights, and the use of the waters described in said complaints in said actions commenced in Mono County, State of California, and are so brought at this time, because the said Rickey Land and Cattle Company, and its officers, deem such action prudent and necessary, because of the old age and infirmity of many of the witnesses, whose testimony is necessary to establish the rights of said Rickey Land and Cattle Company to the said waters, and rights to the waters, and rights to the use of waters described in said complaints in said actions commenced in Mono County, State of California, as against the defendants in said suits, and because the relief sought in

such actions so commenced in the Superior Court of Mono County, cannot be obtained in any other court. Affiant further denies and says that it is not true that all, either, or any of the said acts, doings, or claims of the said defendant, Rickey Land and Cattle Company, herein, are contrary to equity or good conscience, or that they, or either of them, tend to the manifest, or any wrong, injury, or oppression of the complainants, or either of them, in the premises. Denies and says that it is not true that on the 5th day of January, 1905, or at any time prior to the 25th day of January, 1905, the said writs of subpoena issued in the said case of Miller & Lux, complainant, vs. T. B. Rickey and others, defendants, No. 731, upon the alleged cross-bills of the complainants herein, or either of them, were served upon said affiant. And in this behalf states that said writs of subpoena were served upon this affiant on the 25th day of January, 1905. And denies and says that it is not true that the summons issued in the said actions commenced in the Superior Court of Mono County were served on the complainants herein on the 7th day of January, 1905; but in that behalf states that said summons in said actions were served upon the complainants herein prior to the 28th day of December, 1904, and that the complainants herein at and prior to the 28th day of December, 1904, appeared and filed demurrers in said actions so commenced in the Superior Court of Mono

County, as herein stated. Wherefore, the affiant, on behalf of said Rickey Land and Cattle Company, prays that this Court deny the petition herein.

THOMAS B. RICKEY.

Subscribed and sworn to before me this 13th day of March, A. D. 1905.

[Notarial Seal] CHAS. H. PETERS,
Notary Public in and for Ormsby Co., Nevada.

In the Circuit Court of the United States, Ninth Circuit, District of Nevada.

JAMES NICHOL et al.,

Complainants,

vs.

RICKEY LAND AND CATTLE COMPANY (a Corporation),

Defendant.

Affidavit of Charles Rickey.

State of California,
County of Inyo,—ss.

Charles Rickey, being duly sworn, deposes and says: That he is, and at all the times mentioned herein was, a citizen of the State of California, over the age of twenty-one years and a resident of Topaz, County of Mono, State of California. That he is and since the organization of the corporation defendant has been one of the stockholders of said defendant

corporation, and has at all times since the organization of said corporation owned and held in his own name and right one hundred (100) shares of the capital stock of said corporation, which said one hundred (100) shares have at all times been of the value of at least twenty thousand ($20,000.00) dollars. That affiant became the owner of said shares by subscription to the capital stock of said corporation.

That Thomas B. Rickey does not now own, nor has he at any time owned any interest in said one hundred (100) shares of the said capital stock of said corporation, and the said stock is now under the absolute and exclusive dominion and control of affiant and affiant is liable and answerable for all burdens and liabilities which attach to the owner of such stock, and is entitled, in his own right, to receive and enjoy all the profits and earnings which accrue to said one hundred (100) shares of said capital stock, to the exclusion of said Thomas B. Rickey.

That the title of the defendant corporation to said water of the west fork of the Walker River mentioned in the complaint herein, and the title of the defendant corporation to the water of the east fork of the Walker River mentioned in the complaint herein, is such as was conveyed to it by said Thomas B. Rickey and in addition thereto, such title as has been acquired by said defendant corporation since its organization by the diversion and appropriation of said defendant corporation of the waters of the

said West Fork of the Walker River and the said East Fork of the Walker River which said diversion and appropriation of said waters, by said corporation to the extent alleged in said complaints in said Superior Court of Mono County, California, to wit, 1575 cubic feet per second from said West Fork of said Walker River and 504 cubic feet per second from said East Fork of said Walker River, has at all times been under claim of right against the whole world, and has at all times since the organization of said corporation been open, notorious, uninterrupted, exclusive, continuous and adverse to the said plaintiffs herein and to all the world.

CHARLES W. RICKEY.

Subscribed and sworn to before me this 10th day of March, 1905.

[Notarial Seal] P. W. FORBES,

Notary Public in and for the County of Inyo, State of California.

In the Circuit Court of the United States, Ninth Circuit, for the District of Nevada.

JAMES NICHOL et al.,

Complainants,

vs.

RICKEY LAND AND CATTLE COMPANY (a Corporation),

Defendant.

Affidavit of Alice B. Rickey.

State of Nevada,
County of Ormsby,—ss.

Alice B. Rickey, being duly sworn, deposes and says: That she is, and at all the times mentioned herein was, a citizen of the State of Nevada, over the age of twenty-one years and a resident of Carson City, Ormsby County, State of Nevada. That she is and since the organization of the corporation defendant has been one of the stockholders of said defendant corporation, and has at all times since the organization of said corporation owned and held in her own name and right one hundred (100) shares of the capital stock of said organization, which said one hundred (100) shares have at all times been of the value of at least twenty thousand ($20,000.00) dollars. That affiant became the owner of said shares by subscription to the capital stock of said corporation. That Thomas B. Rickey does not now own, nor has he at any time owned, any interest in said one hundred (100) shares of the capital stock of said corporation, and the said stock is now under the absolute and exclusive dominion and control of affiant, and affiant is liable and answerable for all burdens and liabilities which attach to the owner of such stock, and is entitled, in her own right, to receive and enjoy all the profits and earnings which accrue to said one hundred (100) shares of said

capital stock, to the exclusion of said Thomas B. Rickey. That the title of the defendant corporation to said water of the West Fork of the Walker River mentioned in the complaint herein, and the title of the defendant corporation to the water of the East Fork of the Walker River mentioned in the complaint herein, is such as was conveyed to it by said Thomas B. Rickey, and in addition thereto, such title as has been acquired by said defendant corporation since its organization by the diversion and appropriation of said defendant corporation of the waters of the said west fork of the Walker River and the said East Fork of the Walker River which said diversion and appropriation of said waters by said corporation to the extent alleged in said complaints in said superior court of Mono county, California, to wit: 1575 cubic feet per second from said West Fork of said Walker River and 504 cubic feet per second from said East Fork of said Walker River, has at all times been under claim of right against the whole world, and has at all times since the organization of said corporation been open, notorious, uninterrupted, exclusive, continuous and adverse to the said plaintiffs herein and to all the world.

ALICE B. RICKEY.

Subscribed and sworn to before me this 13th day of March, A. D. 1905.

[Notarial Seal] CHAS. C. PETERS,

Notary Public in and for Ormsby Co., Nevada.

[Endorsed]: No. 796. In the Circuit Court of the U. S., Ninth Circuit, District of Nevada. James Nichol, et al., Complainants, vs. Rickey Land and Cattle Company, a Corporation, Defendant. Affidavit of Thomas B. Rickey, Charles Rickey and Alice B. Rickey to the order to show cause why injunction should not issue restraining action in Mono County. Filed March 13, 1905. T. J. Edwards, Clerk.

District of Nevada—ss.

In the Circuit Court of the United States for the District of Nevada.

At a term thereof begun and held at Carson City, in said district, on the 19th day of March, 1906—Present, Honorable THOMAS P. HAWLEY, Judge—the following order was made and entered of record, to wit:

No. 796.

JAMES NICHOL, F. FEIGENSPAN, ANGUS McLEOD, MARY T. SHAW, DEWITT CROWNINSHIELD, M. J. GREEN, C. F. MEISSNER, HAMILTON WISE, J. F. HOLLAND, C. F. HOLLAND, THOS. HALL, E. S. CROSS, D. J. BUTLER, J. S. SWEETMAN, JOHN COMPSTON, J. C. MILLS, A. W. GREEN and SPRAGG-WOODCOCK DITCH COMPANY, (a Corporation),

Complainants,

vs.

THE RICKEY LAND AND CATTLE COMPANY (a Corporation),

Respondents.

Order for Injunction Pendente Lite.

The motion of the above-named complainants requiring the defendant, the Rickey Land and Cattle Company, a corporation, to show cause why an injunction should not issue pending this suit according to the prayer of the bill of complaint herein, having come on regularly to be heard upon the bill, which is duly verified, and upon the affidavits filed herein by the respondent in opposition thereto, and the Court having heard the arguments of counsel for the respective parties, and the same having been

duly considerd by the Court, and it appearing to the Court that the complainants are entitled to an injunction pendente lite, according to the prayer of their bill herein: Now, therefore, it is hereby ordered, adjudged and decreed that the said respondent, the Rickey Land and Cattle Company, a corporation, its agents, servants and attorneys, and all persons acting in aid of any of them, be, and they are hereby enjoined and restrained from further prosecuting, as against these complainants or any of them, either of the two actions brought by said respondent, the Rickey Land and Cattle Company, on the 15th day of October, 1904, in the Superior Court of the County of Mono, State of California, against said complainants above named, and others, as defendants, and respectively numbered 1055 and 1056 on the register of said Superior Court, and from taking any further step whatsoever in either of said actions as against these complainants, or either of them, pending the final hearing and determination of this suit, and until the further order of this Court.

And it further appearing to the Court that this injunction may be safely granted without requiring any bond from said complainants herein, it is further ordered that the said writ of injunction may be issued herein as aforesaid without any bond being furnished by complainants.

The above is a true copy from the record of an order made by said court on the 25th day of June, 1906.

In the Circuit Court of the United States, Ninth Circuit, District of Nevada.

No. 796.

JAMES NICHOL, F. FEIGENSPAN, ANGUS McLEOD, MARY T. SHAW, DEWITT CROWNINSHIELD, M. J. GREEN, C. F. MEISSNER, HAMILTON WISE, J. F. HOLLAND, C. F. HOLLAND, THOS. HALL, E. S. CROSS, D. J. BUTLER, J. S. SWEETMAN, JOHN COMPSTON, J. C. MILLS, A. W. GREEN, and SPRAGG-WOODCOCK DITCH COMPANY (a Corporation),

Complainants,

vs.

THE RICKEY LAND AND CATTLE COMPANY (a Corporation),

Defendant.

Petition for Appeal.

The above-named defendant, Rickey Land and Cattle Company, a corporation, conceiving itself aggrieved by the interlocutory order and decree made on the 25th day of June, 1906, and entered on the 25th day of June, 1906, in the above-entitled cause, wherein it was ordered and decreed that the said defendant

be enjoined and restrained from further prosecuting as against James Nichol, F. Feigenspan, Angus McLeod, Mary T. Shaw, Dewitt Crowninshield, M. J. Green, C. F. Meissner, Hamilton Wise, J. F. Holland, C. F. Holland, Thos. Hall, E. S. Cross, D. J. Butler, J. S. Sweetman, John Compston, J. C. Mills, A. W. Green, and Spragg-Woodcock Ditch Company, a corporation, those certain actions brought by the defendant in the Superior Court of Mono County, State of California, and from taking any further steps in said action pending the final hearing and determination of the said above-entitled suit and until the further order of said Circuit Court. And the said Rickey Land and Cattle Company, a corporation, prays that this, its appeal to the United States Circuit Court of Appeals for the Ninth Circuit, may be allowed and that a transcript of the record and proceedings and papers upon which said interlocutory decree, order and judgment was made, duly authenticated, may be sent to said United States Court of Appeals for the said Ninth Circuit. And now, at the time of filing this petition for appeal, the said Rickey Land and Cattle Company, a corporation, appellant, files an assignment of errors, setting up separately and particularly each error asserted and intended to be argued in the United States Circuit Court of Appeals for the said Ninth Circuit.

And your petitioner will ever pray.

[Corporate Seal]

RICKEY LAND AND CATTLE CO., INC.

By T. B. RICKEY, President,

Defendant and Appellant.

JAMES F. PECK,

CHAS. C. BOYNTON,

Solicitors for Defendant.

[Endorsed]: No. 796. In the Circuit Court of the United States, Ninth Circuit, District of Nevada. James Nichol et al., Complainants, vs. The Rickey Land and Cattle Company, a Corporation, Defendant. Petition for Appeal. Filed July 23, 1906. T. J. Edwards, Clerk. James F. Peck, Charles C. Boynton, Solicitors for Defendant and Appellant. Offices, 911 Laguna St., San Francisco, Cal.

In the Circuit Court of the United States, Ninth Circuit, District of Nevada.

No. 796.

JAMES NICHOL, F. FEIGENSPAN, ANGUS McLEOD, MARY T. SHAW, DEWITT CROWNINSHIELD, M. J. GREEN, C. F. MEISSNER, HAMILTON WISE, J. F. HOLLAND, C. F. HOLLAND, THOS. HALL, E. S. CROSS, D. J. BUTLER, J. S. SWEETMAN, JOHN COMPSTON, J. C. MILLS, A. W. GREEN, and SPRAGG-WOODCOCK DITCH COMPANY (a Corporation),

Complainants,

vs.

THE RICKEY LAND AND CATTLE COMPANY (a Corporation),

Defendant.

Assignment of Errors.

Assignment of errors on the appeal from the order and decree made on the 25th day of June, 1906, and entered on the 25th day of June, 1906, in the above-entitled cause, on the complaint of James Nichol, F. Feigenspan, Angus McLeod, Mary T. Shaw, Dewitt Crowninshield, M. J. Green, C. F. Meissner, Hamilton Wise, J. F. Holland, C. F. Holland, Thomas Hall, E. S. Cross, D. J. Butler, J. S. Sweetman, John

Compston, J. C. Mills, A. W. Green, and Spragg-Woodcock Ditch Company, a corporation, which said order and decree enjoined The Rickey Land and Cattle Company, a corporation, from prosecuting two certain actions in the Superior Court of Mono County, State of California, as against the said complainants, and said Rickey Land and Cattle Company, a corporation, says that in the record and proceedings in the above-entitled action there is manifest error in this, to wit:

First.—The Court erred in making said order and decree appealed from in this, that the cross-complaints, and each of them, of the said complainants, wherein the said cross-complainants sought to have determined by said Circuit Court of the United States, Ninth Circuit, District of Nevada, the rights of said cross-complainants to the use of the water of Walker River, as between said cross-complainants and the Rickey Land and Cattle Company, a corporation, and T. B. Rickey, the predecessor in interest of the said Rickey Land and Cattle Company, upon which said cross-complaints said order and decree was predicated, was not a proper cross-complaint in the action in which the same were filed as against T. B. Rickey, or as against his successor in interest, said Rickey Land and Cattle Company, because the said rights sought to be determined between each of the said cross-complainants in said cross-complaints, as against T. B. Rickey and his successor, the said

Rickey Land and Cattle Company, a corporation, were in no manner defensive to the main action of Miller & Lux vs. T. B. Rickey and said cross-complainants and others, nor was the determination of the controversy sought to be made by said cross-complaints between said cross-complainants and said T. B. Rickey, or his successor in interest, said Rickey Land and Cattle Company, necessary in order that either of the said cross-complainants might make a full and complete defense of all rights of said cross-complainants in the said case of Miller & Lux vs. T. B. Rickey and said cross-complainants and others.

Second.—The Court erred in making said order and decree appealed from in this, that the cross-complaints of the complainants herein, filed by them in the action of Miller & Lux vs. T. B. Rickey and said cross-complainants and others, wherein the said cross-complainants, complainants herein, sought to have determined by said Circuit Court of the United States, Ninth Circuit, District of Nevada, the rights to the use of the water of Walker River, between said cross-complainants and T. B. Rickey and the Rickey Land and Cattle Company, upon which said cross-complaints said order and decree appealed from was predicated, was not a proper cross-complaint in said action of Miller & Lux vs. T. B. Rickey and others, because the said controversy made between said cross-complainants and T. B. Rickey and his successor in interest, the said Rickey Land and Cattle Company

was a controversy between residents of the same state, to wit, residents of the State of Nevada, and the said controversy and the determination of said controversy between said cross-complainants and T. B. Rickey and his successor in interest, the said Rickey Land and Cattle Company, was in no way necessary or pertinent to the full determination of the defense of either of the said cross-complainants in said suit of Miller & Lux vs. T. B. Rickey and said cross-complainants and others, and neither of the said cross-complaints was in any manner ancillary to said suit of Miller & Lux vs. T. B. Rickey and said cross-complainants and others, and the said Circuit Court of the United States, Ninth Circuit, District of Nevada, had no jurisdiction to determine the controversy sought to be made by each of said cross-complainants between said cross-complainants and said T. B. Rickey, or his successor in interest, the said Rickey Land and Cattle Company, all of whom were residents of the State of Nevada.

Third.—That each of said cross-complaints filed by said complainants herein in the action of Miller & Lux vs. T. B. Rickey and others, in so far as it makes a party thereto, the Rickey Land and Cattle Company, was not a proper cross-complaint in the action of Miller & Lux vs. T. B. Rickey and the said cross-complainants and others, because each of said cross-complaints introduces a new party to said action, to wit, the Rickey Land and Cattle Company,

and said order and decree appealed from, predicated upon said cross-complaints, was error.

Fourth.—That the jurisdiction of the Superior Court of Mono County had attached to all the defendants in said actions in Mono County by the service of summons in said actions upon all the defendants therein, including the complainants herein, before the writs of subpoena ad respondendum issued out of the said Circuit Court of the United States, Ninth Circuit, District of Nevada, upon and pursuant to the prayers in each cross-complaint filed by the complainants herein in said action of Miller & Lux vs. T. B. Rickey and others, had been served, so that the Superior Court of Mono County acquired jurisdiction to quiet the title of said Rickey Land and Cattle Company to the use of the waters of the Walker River in the State of California, before the said Circuit Court of the United States, Ninth Circuit, District of Nevada, acquired any jurisdiction of the defendant, Rickey Land and Cattle Company, by reason of the filing of said cross-complaints, and it was, therefore, error for the Circuit Court of the United States, Ninth Circuit, of the District of Nevada to make its order and decree appealed from based upon the said cross-complaints.

Fifth.—That the said actions in Mono County were commenced and prosecuted to quiet the title of the plaintiff therein, the Rickey Land and Cattle Company, a corporation, to certain waters of the Walker

River in the State of California, and to procure a judgment of the Superior Court of Mono County quieting the title of the Rickey Land and Cattle Company, a corporation, to certain waters of the Walker River, and to the use of certain of the waters of the Walker River in the State of California, as against the said complainants herein and others, and the said action of Miller & Lux vs. T. B. Rickey and others in the Circuit Court of the United States, Ninth Circuit, District of Nevada, was brought to enjoin T. B. Rickey and the said complainants herein from diverting the waters of said Walker River, and the said Circuit Court erred in making the decree herein appealed from, because no proceeding which had been taken, nor any proceeding which might be taken, nor any judgment which might be rendered in the Superior Court of Mono County in said actions commenced and prosecuted therein, could in any manner, way or form, impair, infringe upon or interfere with the jurisdiction of the said Circuit Court of the United States, Ninth Circuit, District of Nevada, in the said case of Miller & Lux vs. T. B. Rickey and others, including the complainants herein, nor could the same in any manner, way or form impair, infringe upon or interfere with the jurisdiction of the said Circuit Court of the United States, Ninth Circuit, District of Nevada, in the said case of Miller & Lux vs. T. B. Rickey and others, including the complainants herein, so far as either of the said com-

plainants herein had a right to invoke the powers of the said Circuit Court of the United States, Ninth Circuit of the District of Nevada.

Sixth.—That the said actions in Mono County were commenced and prosecuted to quiet the title of the plaintiff herein, the Rickey Land and Cattle Company, a corporation, to certain waters and the use of certain waters of the Walker River in the State of California, and to procure judgment of the superior court in said Mono County quieting the title of the Rickey Land and Cattle Company, as against the said complainants herein and others, and the said action of Miller & Lux vs. T. B. Rickey and others, including complainants herein, in the Circuit Court of the United States, Ninth Circuit. District of Nevada, was brought to enjoin T. B. Rickey and others, including complainants herein, from diverting the waters of said Walker River, and the interlocutory order and decree herein appealed from was rendered in a proceeding claimed to be ancillary to said action of Miller & Lux vs. T. B. Rickey and others, said Rickey Land and Cattle Company was not a party to said action of Miller & Lux vs. T. B. Rickey et al., and would not be bound by the judgment or decree rendered therein, and the said Circuit Court of the United States, Ninth Circuit, District of Nevada, erred, therefore, in restraining the Rickey Land and Cattle Company from prosecuting said actions in said Mono County.

Seventh.—That the said Circuit Court, Ninth Circuit, District of Nevada, had no jurisdiction to try and determine the rights to the use by T. B. Rickey of the waters of Walker River in the State of California, nor the title of T. B. Rickey to the waters of Walker River in the State of California, nor the use by the Rickey Land and Cattle Company, a corporation, of the waters of the Walker River in the State of California, nor the title of the Rickey Land and Cattle Company to the waters of the Walker River in the State of California, in said action of Miller & Lux vs. T. B. Rickey et al., and, therefore, had no jurisdiction over the Rickey Land and Cattle Company, the successor in interest of T. B. Rickey, to the use of said water and the right to the use of said water, because the water was in the State of California, and the use of said water and the diversion of said water was made by said T. B. Rickey and by the said Rickey Land and Cattle Company, his successor, in the State of California, and the said water and the land upon which the use of the said water was made was all in the State of California and not in the State of Nevada, and the said Circuit Court of the United States, Ninth Circuit, District of Nevada, has no jurisdiction to try the rights of said Rickey Land and Cattle Company to the use of the water of the Walker River or the title of the Rickey Land and Cattle Company to the use of the waters of the Walker River as the successor of T. B. Rickey, and

the said court erred, therefore, in rendering the said order and decree restraining appellant from prosecuting said actions in Mono County.

Eighth.—That the Court had no jurisdiction to render said order and decree appealed from as against the appellant, Rickey Land and Cattle Company.

Ninth.—That it was error for the said Circuit Court of the United States of the District of Nevada to make and render said order and decree appealed from.

Tenth.—That the said complaint upon which said interlocutory order and decree appealed from was granted does not state facts sufficient to entitle the complainants therein to the said interlocutory order and decree.

Eleventh.—That before the cross-complaints filed by the complainants in the action of Miller & Lux vs. T. B. Rickey and others, including complainants, the Rickey Land and Cattle Company, a corporation, was the owner of all the right, title and interest of, in and to the waters of the Walker River, and in and to the use of the waters of the Walker River which the Rickey Land and Cattle Company have since been entitled to and owned, and at the time that the said Rickey Land and Cattle Company acquired its rights

and ownership of the said waters of the Walker River, there was no proceeding or proceedings in the Circuit Court of the United States, Ninth Circuit, District of Nevada, commenced by or on behalf of said complainants, or either of them, affecting or involving the title of said T. B. Rickey, the grantor of the Rickey Land and Cattle Company, thereto, and the said Rickey Land and Cattle Company was not a party to the suit of Miller & Lux vs. T. B. Rickey and others, including said complainants; therefore, the Court erred in enjoining and restraining the prosecution of said suits in Mono County by said interlocutory order and decree appealed from.

In the action of Miller & Lux, a corporation, vs. T. B. Rickey and others, commenced in the Circuit Court of the United States, Ninth Circuit, for the District of Nevada, the Pacific Livestock Company, a corporation, was substituted as complainant, and whenever said action is referred to herein it is intended to include the said action as the same is now pending, with said substituted complainant.

Wherefore, the appellant, the Rickey Land and Cattle Company, prays that the decree of said Circuit Court of the United States, Ninth Circuit, for the District of Nevada, be reversed and the said Circuit Court of the United States, Ninth Circuit, for

the District of Nevada, be ordered to enter an order and decree dissolving the injunction and restraint made by the said order and decree appealed from.

[Corporate Seal]

RICKEY LAND AND CATTLE CO., INC.,

By T. B. RICKEY, President,

Defendant and Appellant.

JAMES F. PECK,

CHARLES C. BOYNTON,

Solicitors for said Corporation Appellant.

[Endorsed]: No. 796. In the Circuit Court of the United States, Ninth Circuit, District of Nevada. James Nichol et al., Complainants, vs. The Rickey Land and Cattle Company, a Corporation, Defendant. Assignment of Errors. Filed July 23, 1906. T. J. Edwards, Clerk. James F. Peck, Charles C. Boynton, Solicitors for Defendant and Appellant. Offices 911 Laguna St., San Francisco, Cal.

In the Circuit Court of the United States, Ninth Circuit, District of Nevada.

No. 796.

JAMES NICHOL, F. FEIGENSPAN, ANGUS McLEOD, MARY T. SHAW, DEWITT CROWNINSHIELD, M. J. GREEN, C. F. MEISSNER, HAMILTON WISE, J. F. HOLLAND, C. F. HOLLAND, THOS. HALL, E. S. CROSS, D. J. BUTLER, J. S. SWEETMAN, JOHN COMPSTON, J. C. MILLS, A. W. GREEN, and SPRAGG-WOODCOCK COMPANY (a Corporation),

Complainants,

vs.

THE RICKEY LAND AND CATTLE COMPANY (a Corporation),

Defendant.

Order Allowing Appeal.

It is ordered that the appeal of the Rickey Land and Cattle Company, appellant in the above-entitled cause, to the United States Circuit Court of Appeals for the Ninth Circuit, from the interlocutory order and decree made in the above-entitled court on the 25th day of June, 1906, in the above-entitled cause, be, and the same hereby is, allowed, and that a certified transcript of the record and proceedings herein be forthwith transmitted to said United States Circuit Court of Appeals. And it is further ordered

that the bond on appeal be fixed at the sum of five hundred dollars ($500), the same to act as a bond for costs and damages on appeal.

Dated San Francisco, Cal., July 23, 1906.

WM. W. MORROW,
Circuit Judge.

[Endorsed]: No. 796. In the Circuit Court of the United States, Ninth Circuit, District of Nevada. James Nichol et al., Complainants, vs. The Rickey Land and Cattle Company, a Corporation, Defendant. Order for Appeal. Filed July 23, 1906. T. J. Edwards, Clerk. James F. Peck, Charles C. Boynton, Solicitors for Defendant and Appellant. Offices 911 Laguna St., San Francisco, Cal.

Bond on Appeal.

Know all men by these presents, that we, Rickey Land and Cattle Company, as principal, and S. Trask and H. C. Cutting, as sureties, are held and firmly bound unto James Nichol, F. Feigenspan, Angus McLeod, Mary T. Shaw, De Witt Crowninshield, M. J. Green, C. F. Meisner, Hamilton Wise, J. F. Holland, C. F. Holland, Thos. Hall, E. S. Cross, D. J. Butler, J. S. Sweetman, John Compston, J. C. Mills, A. W. Green, and the Spragg & Woodcock Ditch Company, a corporation, in the full and just sum of five hundred dollars, to be paid to the said James Nichol, F. Feigenspan, Angus McLeod, Mary T.

Shaw, De Witt Crowninshield, M. J. Green, C. F. Meisner, Hamilton Wise, J. F. Holland, C. F. Holland, Thos. Hall, E. S. Cross, D. J. Butler, J. S. Sweetman, John Compston, J. C. Mills, A. W. Green, and the Spragg & Woodcock Ditch Company, a corporation, certain attorney, executors, administrators or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 23d day of July, in the year of our Lord one thousand nine hundred and six. Whereas, lately at a Circuit Court of the United States for the Ninth Circuit, District of Nevada, in a suit depending in said court, between James Nichol, F. Feigenspan, Angus McLeod, Mary T. Shaw, De Witt Crowninshield, M. J. Green, C. F. Meisner, Hamilton Wise, J. F. Holland, C. F. Holland, Thos. Hall, E. S. Cross, D. J. Butler, J. S. Sweetman, John Compston, J. C. Mills, A. W. Green, and the Spragg & Woodcock Ditch Company, a corporation, are complainants, and the Rickey Land and Cattle Company, a corporation, is defendant, an interlocutory order and decree was rendered against the said Rickey Land and Cattle Company and the said Rickey Land and Cattle Company, a corporation, having obtained from said court an order allowing it to appeal to reverse the said order and decree in the aforesaid suit, and a citation directed to the said James Nichol, F. Feigenspan, Angus Mc-

Leod, Mary T. Shaw, De Witt Crowninshield, M. J. Green, C. F. Meisner, Hamilton Wise, J. F. Holland, C. F. Holland, Thos. Hall, E. S. Cross, D. J. Butler, J. S. Sweetman, John Compston, J. C. Mills, A. W. Green and the Spragg & Woodcock Ditch Company, citing and admonishing them to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at San Francisco, in the State of California.

Now, the condition of the above obligation is such, that if the said Rickey Land and Cattle Company, a corporation, shall prosecute its said appeal to effect and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

[Corporate Seal]

RICKEY LAND AND CATTLE CO., INC.

By T. B. RICKEY, President. [Seal]

S. TRASK. [Seal]

H. C. CUTTING. [Seal]

Acknowledged before me the day and year first above written.

[Court Seal] F. D. MONCKTON,

Clerk U. S. Circuit Court of Appeals for the Ninth Circuit.

United States of America,
District of Nevada,—ss.

S. Trask and H. C. Cutting, being duly sworn, each for himself deposes and says that he is a freeholder

in said district and is worth the sum of five hundred dollars, exclusive of property exempt from execution, and over and above all debts and liabilities.

S. TRASK.
H. C. CUTTING.

Subscribed and sworn to before me, this 23d day of July, A. D. 1906.

[Court Seal] F. D. MONCKTON,
Clerk U. S. Circuit Court of Appeals for the Ninth Circuit.

[Endorsed]: No. 796. United States Circuit Court, District of Nevada, for the Ninth Circuit. James Nichol, et al., Complainants, vs. Rickey Land and Cattle Company, a Corporation, Defendant. Bond on Appeal. Form of Bond and Sufficiency of Sureties Approved. Wm. W. Morrow, Judge. Filed July 23, 1906. T. J. Edwards, Clerk.

In the Circuit Court of the United States, Ninth Circuit, District of Nevada.

No. 796.

JAMES NICHOL et al.,

Complainants,

vs.

RICKEY LAND AND CATTLE COMPANY,

Respondent.

Clerk's Certificate to Transcript.

I, T. J. Edwards, Clerk of the Circuit Court of the United States, Ninth Circuit, District of Nevada, do hereby certify that the foregoing fifty-one typewritten pages numbered from 1 to 51, inclusive, are a true copy of the record and proceedings in the cause therein entitled. That the cost of this record is $45.80, and the same has been paid by the appellant.

In witness whereof, I have hereunto set my hand and affixed the seal of said, at Carson City, Nevada, this 30th day of August, 1906.

[Seal] T. J. EDWARDS,
Clerk.

Citation on Appeal.

UNITED STATES OF AMERICA—ss.

The President of the United States, to James Nichol, F. Feigenspan, Angus McLeod, Mary T. Shaw, Dewitt Crowninshield, M. J. Green, C. F. Meissner, Hamilton Wise, J. F. Holland, C. F. Holland, Thos. Hall, E. S. Cross, D. J. Butler, J. S. Sweetman, John Compston, J. C. Mills, A. W. Green, and Spragg-Woodcock Ditch Company, a Corporation, and Their Solicitors, Messrs. Mack and Farrington and Geo. S. Green, Greeting:

You are hereby cited an dadmonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San

Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal, of record in the clerk's office of the United States Circuit Court for the District of Nevada, wherein Rickey Land and Cattle Company, a corporation, is appellant, and you are appellees, to show cause, if any there be, why the decree rendered against the said appellant, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable W. W. MORROW, United States Circuit Judge for the United States Circuit Court, Ninth Circuit, this 23d day of July, A. D. 1906.

WM. W. MORROW,
United States Circuit Judge.

Due service of the within citation admitted this 3d day of July, 1906.

MACK & FARRINGTON,
Solicitors for James Nichol et al.

[Endorsed]: No. 796. U. S. Circuit Court, District of Nevada, for the Ninth Circuit. James Nichol et al., Complainants, vs. Rickey Land and Cattle Company (a Corporation), Defendant. Citation on Appeal. Filed August 30th, 1906. T. J. Edwards, Clerk U. S. Circuit Court, District of Nevada.

[Endorsed]: No. 1372. United States Circuit Court of Appeals for the Ninth Circuit. Rickey Land and Cattle Company, a Corporation, Appellant, vs. James Nichol, F. Feigenspan, Angus McLeod, Mary T. Shaw, Dewitt Crowninshield, M. J. Green, C. F. Meissner, Hamilton Wise, J. F. Holland, C. F. Holland, Thos. Hall, E. S. Cross, D. J. Butler, J. S. Sweetman, John Compston, J. C. Mills, A. W. Green, and Spragg-Woodcock Ditch Company, a Corporation, Appellees. Transcript of Record. Upon Appeal from the United States Circuit Court for the District of Nevada.

Filed September 5, 1906.

F. D. MONCKTON,

Clerk.

No. 1372

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

RICKEY LAND AND CATTLE COMPANY (a Corporation),

Appellant,

vs.

JAMES NICHOL, F. FEIGENSPAN, ANGUS McLEOD, MARY T. SHAW, DeWITT CROWNINSHIELD, M. J. GREEN, C. F. MEISSNER, HAMILTON WISE, J. F. HOLLAND, C. F. HOLLAND, THOS. HALL, E. S. CROSS, D. J. BUTLER, J. S. SWEETMAN, JOHN COMPSTON, J. C. MILLS, A. W. GREEN, and SPRAGG-WOODCOCK DITCH COMPANY (a Corporation),

Appellees.

Appellant's Opening Brief.

JAMES F. PECK,
CHAS. C. BOYNTON,
Solicitors for Appellant.

PRESS OF THE JAMES H. BARRY CO.
212-214 LEAVENWORTH ST.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

RICKEY LAND AND CATTLE COMPANY, a Corporation,

Appellant,

vs.

JAMES NICHOL, F. FEIGENSPAN, ANGUS MCLEOD, MARY T. SHAW, DEWITT CROWNINSHIELD, M. J. GREEN, C. F. MEISSNER, HAMILTON WISE, J. F. HOLLAND, C. F. HOLLAND, THOS. HALL, E. S. CROSS, D. J. BUTLER, J. S. SWEETMAN, JOHN COMPSTON, J. C. MILLS, A. W. GREEN, and SPRAGG-WOODCOCK DITCH COMPANY (a Corporation),

Appellees.

APPELLANT'S OPENING BRIEF.

The essential facts of this case are as follows:

On June 10, 1902, Miller & Lux, a corporation organized under the laws of California, commenced an action in the United States Circuit Court for the Dis-

trict of Nevada against one Thomas B. Rickey and appellees herein, all citizens of the State of Nevada, to enjoin them from diverting water from the Walker River, a stream rising in the eastern part of the State of California and flowing into and through the western part of the State of Nevada, and alleged that said defendants were depriving said Miller & Lux from the use of water on its lands in the State of Nevada.

Said Thomas B. Rickey owned certain lands and water rights on the Walker River in the State of California and higher up on the stream than the lands of Miller & Lux in the State of Nevada.

On August 6, 1902, said Thomas B. Rickey transferred his lands and water rights in the State of California to the Rickey Land and Cattle Company, appellant herein, a corporation organized under the laws of the State of Nevada.

On October 15, 1904, the Rickey Land and Cattle Company, appellant herein, commenced two actions in the Superior Court of Mono County, State of California, against appellees herein and others, to quiet its titles to certain waters of the Walker River in the State of California, appurtenant and riparian to its lands in the State of California.

Summons was served on all the appellees herein and all the appellees herein appeared in said actions and filed general demurrers in said actions in Mono County, State of California, prior to the 28th day of December, 1904.

On the 5th day of January, 1905, the appellees herein filed cross bills in the original action against said Thomas B. Rickey and subpœnas *ad respondendum* issued on said cross bills were served on said T. B. Rickey on the 25th day of January, 1905.

On the 28th day of January, 1905, this action was commenced by appellees herein to enjoin said Rickey Land and Cattle Company from prosecuting said actions in Mono County.

Certain of the questions involved in this appeal were considered by this Court in the cases of the *Rickey Land and Cattle Company* vs. *Henry Wood et al.* and the *Rickey Land and Cattle Company* vs. *Miller & Lux et al;* numbered 1365 and 1366, respectively, which cases are now pending before the Supreme Court of the United States on petitions for writs of certiorari.

One question, namely, the jurisdiction of the United States Circuit Court for the district of Nevada in a local action over property and water rights wholly in the State of California, which is likewise involved in this appeal, was determined adversely to appellant's contention in the case of the *Rickey Land and Cattle Company* vs. *Miller & Lux,* No. 1366, and the question of the jurisdiction of the United States Circuit Court, in an action to enjoin the diversion of specific water from a stream, to entertain a cross bill filed by one defendant against a co-defendant in said action, both of whom were citizens of the same State, which is likewise involved in this appeal, was also determined

by this Court contrary to appellant's contentions in the case of the *Rickey Land and Cattle Company* vs. *Henry Wood et al,* No. 1365.

As both of these questions were discussed quite fully on those two appeals, we will not at this time venture to impose on your Honors with further lengthy arguments in support of the contentions thereunder, but there is one question of importance in this case that did not arise in the above cases and it thus differentiates the present case from the two above cases.

As will be observed from the above statement of facts, the summons was served and the defendants appeared in the actions commenced in Mono County prior to the filing of the cross bills or the issuing of any process on behalf of appellees herein, whereas in the case of the *Rickey Land and Cattle Company* vs. *Henry Wood et al,* the cross bill was filed and the subpœna served prior to the service of summons on Henry Wood *et al,* in the Mono County suit.

It is the contention of appellant that there is no conflict of jurisdiction between the suits commenced by appellant in Mono County, California, and the proceedings under the cross bills filed by appellees in the action of *Miller & Lux* vs. *Rickey,* filed in the United States Circuit Court for the district of Nevada. Appellant's contention is that the action commenced in Nevada had as its subject matter property located exclusively within the State of Nevada. That, the action being local, the jurisdiction of the court in that action

was limited to a subject matter lying within the territorial limits of the district of Nevada. Likewise as to the actions in California which are actions to quiet title to real property situated in California. These actions, being local, the jurisdiction of the court therein is confined exclusively to the subject matter located within the State of California. Thus the jurisdiction in the Nevada actions is confined to a subject matter in the State of Nevada, and the jurisdiction of the subject matter in the California actions is confined to the State of California, and there is no room or possibility for any conflict of jurisdiction. *Northern Indiana R. R. Co.* vs. *Michigan Central R. R. Co.,* 15 How., 233.

The fact that the subject matter of the action commenced in the court of the State of Nevada is an easement in a stream which flows through and out of the State of California into and through the State of Nevada cannot transfer that portion of the easement which is in the California part of the stream into the State of Nevada. Nor does the fact, that the lands, to which this easement is appurtenant, happen to lie in the State of Nevada, have the effect of transferring the locus of the easement in the California portion of the stream out from the State of California and into the State of Nevada. Nature fixes the location of the easement. It follows the stream. That part of the easement which is imposed upon the portion of the stream that lies in the State of Nevada is located within the State of Nevada, and that portion of the easement which is im-

posed on that portion of the stream which lies within the State of California is in the State of California. The fact that the lands to which that portion of the easement which is imposed upon the stream flowing in the State of California is appurtenant to lie the State of Nevada, can by no possibility transfer the locus of that easement out from the State of California into the State of Nevada, which seems to have been the theory of the Court below.

But assume that the fact that the easement in the stream is appurtenant to lands lying in Nevada has the effect to transfer the locus of that portion of the easement that is imposed upon the stream flowing in the State of California out from the State of California and into the State of Nevada, then that very fact would locate the subject matter of the action commenced in the State of Nevada entirely within the State of Nevada and outside of the territorial limits of the jurisdiction of the California court.

This very fact would render it impossible for there to be any conflict between the jurisdiction of the respective courts; the subject matter of one suit being confined to the State of Nevada, and the subject matter of the other suit being confined to the State of California; thus the subject matter of the two controversies is distinct and different and the only basis for a conflict of jurisdiction does not exist.

The foregoing questions were argued somewhat elaborately in the above-referred-to appeals, wherein many cases were cited to support appellant's contentions.

But in the present case, for the purposes of argument, assuming that somehow there is a conflict between the jurisdiction of the court of the State of Nevada and the court of the State of California, in these respective actions, still there is a well settled rule that

> "Where a State court and a court of the United States may each take jurisdiction, the tribunal which first gets it, holds it to the exclusion of the other until its duty is fully performed and the jurisdiction invoked is exhausted. * * * It is maintained as a principal of universal jurisprudence that where a jurisdiction has attached to a person or thing, it is, unless there is some provision to the contrary, exclusive in effect until it has wrought its function." *Taylor* vs. *Taintor,* 16 Wall., 366-370.
>
> "The rule is that the tribunal which first acquires jurisdiction of a cause by the issuance and service of process is entitled to retain it to the end, without interference or hindrance on the part of any other court. And this rule, in its application to Federal and State courts, being the outgrowth of necessity, is a principle of right and of law which leaves nothing to the discretion of a court and may not be varied to suit the convenience of litigants." *Merritt* vs. *Steel Barge Co.,* 24 C. C. A., 530-534, 79 Fed., 228-231.

In the present case, from the facts as stated in the record, it appears that the jurisdiction of the California court completely attached on or before December 28, 1904, prior to which time appellees had not alone been served with summons, but had appeared and filed a general demurrer in the actions commenced in Mono County, and thus affirmatively waived any objection to the jurisdiction of the California court. Later, after this waiver and consent on the part of appellees and after the jurisdiction of the California court had thus fully attached, the appellees, on the 5th day of January, 1905, filed cross bills against Thomas B. Rickey in the action commenced by Miller & Lux in the United States Circuit Court for the district of Nevada, on June 10th, 1902, and then, on the theory that the fact that the Rickey Land and Cattle Company purchased its lands and waters in California from Thomas B. Rickey gave the Nevada court jurisdiction under the cross bills over a controversy concerning said lands and waters in California between appellees and said Rickey Land and Cattle Company, it is contended that a conflict of jurisdiction has resulted between the United States Circuit Court for the district of Nevada, proceeding under the cross bills of appellees, and the State court of California, proceeding under the actions brought by appellant in Mono County. From the above authorities it is plain that, as the jurisdiction of the State court of California had completely attached, at least a week prior to the initiation of any proceedings in the Federal court,

assuming that there was any conflict of jurisdiction, it is the Federal court that should stay its hand, until the conclusion of the proceedings previously initiated in the State court.

As was said in the case of *Rogers* vs. *Pitt,* 96 Fed., on page 670,

> "The general rule is well settled that where different courts have concurrent jurisdiction, the court which first acquires jurisdiction over the parties, the subject matter, the specific thing, or the property in controversy, is entitled to retain the jurisdiction to the end of the litigation, without interference by any other court. This rule is important to the exercise of jurisdiction by the courts whose powers are liable to be exerted within the same spheres and over the same subjects and parties. There is but one safe road for all the courts to follow. By adhering to this rule, the comity of the courts, National and State, is maintained, the rights of the respective parties preserved, and the ends of justice secured, and all unnecessary conflicts avoided. Any other rule would be liable at any time to lead to confusion, if not open collision, between the courts, which might bring about injurious and calamitous results. This rule is elementary, and the citations under all the authorities in its support would be endless and useless."

Here follows over a half page of authorities.

Appellees' counsel in the court below conceded the foregoing authorities to correctly state the law, but

sought to differentiate them from the present case by arguing that while the controversies initiated by the filing of these cross bills were not brought before the court by the original bill filed by Miller and Lux against T. B. Rickey *et al* in the United States Circuit Court for the district of Nevada, yet they lay potentially within the jurisdiction of the court under that original bill. That is to say, that upon the filing of the original bill by Miller and Lux, the court in Nevada acquired a kind of potential jurisdiction that enabled it to embrace and take in all these other controversies that were thereafter sought to be initiated by the filing of these cross bills. Thus it was argued that the subject matter of the action brought in the Nevada court by Miller and Lux against appellees and Thomas B. Rickey included not alone the controversy between Miller and Lux and the defendants in that action, but included all controversies that might be thereafter begun and litigated between the defendants themselves in that action by the filing of cross bills against each other. The first jurisdiction, namely, that of the controversy between Miller and Lux and the defendants in that action, existed actually, and the jurisdiction of the court in that action over controversies among the co-defendants prior to the filing of the cross bills, existed potentially in the court in that action.

Thus at the time the suits were filed and the summons was served and the defendants appeared in the actions in Mono County, while as yet no actual con-

troversy had been initiated between appellees and Thomas B. Rickey in the action commenced in the State of Nevada, yet, as the Nevada court in that action had potential jurisdiction over such controversy, the filing of the actions in Mono County caused a conflict between the jurisdiction of the two courts to arise.

If this argument is correct, the fact that the cross bills were filed by appellees becomes immaterial.

The conflict in jurisdiction arose immediately upon the filing of the actions in Mono County against appellees and the fact that later appellees decided they would like to have the Nevada court proceed and try this controversy has no weight in this case.

If this argument is correct, appellees need not have filed the cross bills, but could have proceeded and brought this action to enjoin the prosecution of this suit in Mono County on the ground that the jurisdiction to decide this controversy already lay potentially in the Nevada court. It is true that they might not care to file the cross bills and to invoke that jurisdiction and cause these controversies to be tried in the Nevada court, yet they had the power to stop appellant from initiating this controversy himself in the courts of the State where all of his property lay, which were the only courts that had jurisdiction to grant him a decree establishing his property rights.

The foregoing argument is obviously futile. Appellees filed these cross bills for the purpose of laying a foundation for an action to enjoin the Rickey Land

and Cattle Company from prosecuting its actions in Mono County. They, nor no one else, would or could dream of the possibility of enjoining these actions commenced in Mono County unless it be shown in some manner that the same controversies existed and were in the process of determination in the Nevada court. Thus the cross bills were filed in the Nevada court in order that a controversy might exist in the Nevada court between appellees and the predecessor in interest of the Rickey Land and Cattle Company. It followed then, they argue, that when a controversy existed between appellees and Thomas B. Rickey, in the Nevada court over the waters of the Walker River, and the controversy existed in the California court between the Rickey Land and Cattle Company and appellees over the waters of the Walker River in the State of California, there arose a conflict of jurisdiction between the courts sitting in the two States.

Assuming, without conceding the above argument to be correct, yet, as the cross bills in the Nevada court were not filed until some days after the jurisdiction of the California court had completely attached, by the service of summons and the appearance of the parties, under the rules heretofore cited it is the Nevada court that should stay its hand, and not the court of the State of California.

The Rickey Land and Cattle Company had a right to have its water titles in the State of California quieted and established. This the court of the State of Nevada

could not do, as the property of the Rickey Land and Cattle Company lay wholly in the State of California. *Conant* vs. *Irrigation Co.,* 23 Utah, 628.

Under the very plain rule laid down in that case, supported by the multitude of decisions by the Supreme Court of the United States cited therein, Mr. Rickey could not, nor could the Rickey Land and Cattle Company as his successor in interest, have filed any cross bill or taken any action to quiet its titles in California against appellees in the suit pending in the State of Nevada. As appellees were lower down on the stream than Mr. Rickey and appellant herein, the only kind of a proceeding that he or appellant could have initiated against appellees, either in the action theretofore commenced by Miller and Lux against Mr. Rickey and appellees in the State of Nevada, or in an action commenced in the State of California, would have been a proceeding to quiet appellant's title, but as all of appellant's titles were located and lay exclusively within the State of California, any action to quiet these titles would have to be commenced in the State of California, which was, consequently, the only jurisdiction in which appellant could have initiated such an action.

Thus, if appellees' arguments are correct, the simple fact that Miller and Lux commenced an action against appellees and Thomas B. Rickey in the Nevada court was of itself sufficient to tie the hands of Mr. Rickey and his successor in interest, the Rickey Land and Cat-

tle Company, and effectually check the initiation of any controversy which could establish or determine the titles to appellant's property in California as against appellees.

Thus it is manifest that this argument, based on the so-called potential jurisdiction that existed in the court of Nevada in the action commenced in the State of Nevada by Miller and Lux against appellees and Thomas B. Rickey over controversies between appellees and the Rickey Land and Cattle Company, is insufficient. The respective rights of the parties herein are to be determined, not by potential jurisdiction, but by actual jurisdiction. The court that first has actual jurisdiction over the subject matter in a controversy should be permitted to hold that jurisdiction until the controversy has been determined. The court has potential jurisdiction over any controversy over which it may have actual jurisdiction after suit is brought. The test is the actual exercise of jurisdiction over a controversy in a court and not the power of the court to exercise jurisdiction in a controversy that may, or may not, be initiated. The court that first actually exercises jurisdiction over a controversy is the one that shall continue to exercise that jurisdiction without interference.

Any two courts having concurrent jurisdiction have potential jurisdiction over all controversies over which they have concurrent jurisdiction, but it has never been argued that this potential jurisdiction existing in a

court until it has become actual by the initiation of a controversy is any basis for an injunction prohibiting any controversy being decided in another court having jurisdiction thereover where the proceedings in the latter court were initiated first and where the latter court first actually acquired complete jurisdiction over the controversy by the service of process or the appearance of parties.

The precise question here at issue was determined in the case of *Rogers* vs. *Pitt,* 96 Fed., 668-673. In that case the original action was brought in the State court in the State of Nevada to determine a controversy between Pitt and Markers, Rogers' predecessor, over rights to the water flowing in the Humboldt River.

While the action was pending in the State court, Rogers, a citizen of the State of California, purchased the property from Markers. Rogers then brought an action in the United States Circuit Court to determine a controversy over the same waters between himself and Pitt. He did this before Pitt took any step in the State court to make Rogers a party to the proceeding then pending in that court. After Rogers invoked the jurisdiction of the Federal court, Pitt proceeded to make Rogers a party to the action theretofore pending in the State court, as the successor in interest to Markers, and Rogers then brought this proceeding in the United States court to enjoin Pitt from prosecuting the action in the State court as against Rogers.

In this case the potential jurisdiction of the State court over the controversy between Rogers and Pitt was absolutely clear. The property purchased by Rogers from Markers was the very subject matter of the suit pending in the State court.

The transfer of this property from Markers to Rogers could not take it out of the jurisdiction of the State court in the action pending between Pitt and Markers at the time of the transfer. A sale of property over which a court has jurisdiction was never known to oust the court of jurisdiction over the property. Thus in this case the State court had actual jurisdiction over the property, and over the controversy concerning the property, prior to the initiation of the action in the Federal court. But the sale of Markers to Rogers seems in a way to have abated the action in the State court until Rogers was made a party thereto. Thus it was held that when Rogers brought the action against Pitt in the Federal court and served the process, the Federal court was the only court that actually had full and complete jurisdiction over the controversy. That being so, the Federal court having full and complete jurisdiction over the controversy between Rogers and Pitt, whereas up to that time the jurisdiction of the State court in the action pending between Pitt and Markers, Rogers' predecessor, was only potential, as to Rogers, and dependent upon Pitt's initiating proceedings in the State court to make Rogers a party to that action, the actual jurisdiction in the Federal court

was held to have precedence, and Pitt was enjoined from proceeding any further in the State court. The reasoning of Judge Hawley on the foregoing premises is as follows:

> "It is, of course, true that there was at that time a suit pending in the State court in which steps could have been previously taken that would have invested that court with full jurisdiction to hear and determine the merits of this case. It is not, however, what might have happened,—what steps might have been taken,—but the pivotal question is, what was the condition at that time under the steps that had been taken. This, it seems to me, is the true test to be applied to the facts set forth in this petition."

The foregoing rule is truly applicable to this case. In this case it may be true that had appellees filed their cross bills and served process thereon in the action pending in the Nevada court before the complaints were filed and the process was served upon appellees in the California court, that the Nevada court would have jurisdiction over the controversy, but, as Judge Hawley said,

> "It is not what might have happened,—what steps might have been taken,—but the pivotal question is, what was the condition at that time under the steps that had been taken."

The condition at the time the cross bills were filed was that theretofore the actions had been commenced in the California courts and the process thereon had been served and the defendants therein had appeared and submitted themselves to the jurisdiction of the court.

This brings us to another phase of this controversy. The fact that, prior to the filing of the cross bills to the action in the Nevada court, appellees appeared and submitted themselves to the jurisdiction of the California court amounted to a waiver on the part of appellees to object to proceedings in the California court on the ground that the same were in conflict with proceedings afterward initiated by themselves on the cross bills filed in the Nevada court. On this proposition also the case of *Rogers* vs. *Pitt, supra,* is distinctly in point. Judge Hawley there said,

> "Whatever the rights of defendants may have been at the time of the institution of the suit in this court, if they had taken proper steps to stay the proceedings in this court as a matter of comity between the State court and this court, it is clear to my mind that by coming into this court after service of process upon them and submitting themselves to its jurisdiction, they waived their rights to have the case tried in the State court."

Wherefore, we respectfully submit:

First, That there exists no conflict of jurisdiction

between the California court and the United States Circuit Court for the district of Nevada by virtue of these actions, by reason of the fact that the subject matter of the action brought in the State of Nevada lay wholly within the State of Nevada, and the subject matter of the action brought in the State of California lay wholly in the State of California, and therefore there was no room for any conflict in jurisdiction.

Second, Assuming that there is a conflict of jurisdiction between the court of Nevada, under the cross bills filed by appellees, and the action commenced in the State court of California by appellant; yet we contend that as the process in the action commenced in the California court was served and the appellees appeared therein prior to the filing of the cross bills or the initiation of any proceedings in the Nevada court, that the California court first acquired complete jurisdiction over the controversy between appellant and appellees and is entitled and should be permitted to retain that jurisdiction to the end of the litigation without interference by any other court.

Wherefore, we respectfully submit that the Circuit Court erred in enjoining the appellant herein from prosecuting the said actions in Mono County.

JAMES F. PECK,
CHAS. C. BOYNTON,
Solicitors for Appellant.

No. 1372

IN THE

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Appellant,

vs.

JAMES NICHOL, F. FEIGENSPAN, ANGUS McLEOD, MARY T. SHAW, DeWITT CROWNINSHIELD, M. J. GREEN, C. F. MEISSNER, HAMILTON WISE, C. F. & J. F. HOLLAND, THOS. HALL, E. S. CROSS, D. J. BUTLER, J. S. SWEETMAN, JOHN COMPSTON, J. C. MILLS, A. W. GREEN and SPRAGG-WOODCOCK DITCH CO., (a Corporation),

Appellees.

Appellee's Brief.

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Appellees.

APPELLEE'S BRIEF

STATEMENT OF THE CASE

On June 10, 1902, Miller and Lux, a California corporation, filed its bill of complaint against Thomas B. Rickey and many other persons, in the United States Circuit Court for Nevada, to obtain an injunction restraining defendants from diverting the waters of Walker River above complainants' lands to its prejudices.

Subpoenas were duly issued by said United States Circuit Court June 10th, 1902, and served upon Thomas B. Rickey and the other defendants. Thomas B. Rickey thereafter entered his appearance and filed his plea to the jurisdiction of the court, which plea was overruled. (Trans. p. 4; 127 Fed. 573). Thereupon the said Rickey filed his answer. (Trans. p. 4; 146 Fed. 574).

The other defendants entered their appearances and filed answers and cross complaints against Miller and Lux and also against Rickey and certain other co-defendants. Demurrers to the cross complaints or cross bills of the other defendants against Miller and Lux were sustained upon the ground that the matters were purely defensive in their nature and character and could be and were set up in the answers filed by them respectively, but the cross bill against co-defendants were held to be proper. (146 Fed. 577).

On August 6th, 1904, which was after the appearance and answer of the said Thomas B. Rickey in the case in the United States Circuit Court as aforesaid, said Thomas B. Rickey caused the Rickey Land and Cattle Company to be incorporated under the laws of the State of Nevada (Trans. p. 7), and conveyed to that Company the water right which he was claiming and which he was defending in the suit then pending in the United States Circuit Court (146 Fed. 584).

On October 15th, 1904, said Rickey Land and Cattle Company commenced two actions in the Superior Court in the County of Mono, State of California, against Miller and Lux, the appellees herein and a

large number of other persons (Trans. pgs. 8 and 9). Summons in the latter actions were issued and served upon the appellees herein, who appeared and filed demurrers to said actions upon the grounds:

(1). That the complaints did not state a cause of action.

(2). That the court did not have jurisdiction (Trans. pgs. 29 and 30).

On January 28th, 1905, while these demurrers were still pending in the Superior Court of Mono County, appellees herein filed a bill of complaint in the United States Circuit Court for Nevada, against the Rickey Land and Cattle Company, praying that such company be enjoined from prosecuting the suits brought by it in the California Court upon the ground that the issues therein involved were the same as those involved in the suit then pending in the United States Court.

It was further alleged that the subpoenas issued by the said United States Circuit Court upon said cross bills were served upon said Thomas B. Rickey on January 7, 1905, and prior to the time of the service of the summons upon appellees in the Mono County suits.

It was further alleged that the necessary effect of such actions in the Mono County Court was to bring for trial and determination the same issues involved in the said United States Circuit Court, so far as related to the issues between appellees and the said Thomas B. Rickey, and to obtain from said Superior

Court a judgment determining said issues in advance of the determination of the same by the United States Circuit Court and thereby defeat the jurisdiction of the latter court in the suit then pending before it and to hinder and embarrass that court in the trial of said issues and in the enforcement of any decree which that court may render in the suit then pending before it.

In the affidavit filed by Thomas B. Rickey, in response to the order to show cause why the Rickey Land and Cattle Company should not be restrained from prosecuting said suits in the said California Court, it was denied that the writs of subpoena upon appellants' cross bills were served prior to the service of the summons in the California case upon appellees, but, on the contrary, it was alleged that the summons issued out of the California Court were served upon the appellees therein before the subpoenas upon the latter's cross-bill had been served. (Trans. p. 50).

If the fact as to priority of service should be material, the presumption upon this appeal will be that the allegations of appellees as to the priority of service are correct, as upon this appeal all intendments are in favor of the correctness of the ruling of the court below, it being a well established rule of appellate procedure that where there is a conflict of evidence upon any material fact, the finding of the trial court will not be disturbed.

The trial court, after due hearing, entered its order enjoining the Rickey Land and Cattle Com-

pany from prosecuting its suits in the California Court, pending a final hearing and determination of the suit then pending before the United States Circuit Court, and the further order of that court; and it is from said order and decree that this appeal is taken by the Rickey Land and Cattle Company. (Trans. pgs. 58 and 60).

POINTS AND AUTHORITIES.

I.

All the questions involved in this case have been decided adversely to appellant by this court in the case of the Rickey Land and Cattle Company vs. Miller and Lux and the Rickey Land and Cattle Company against Wood (152 Fed. pgs. 11 and 19), as well as by the court below (146 Fed. 574), excepting possibly the single point, based upon the fact that appellees herein filed demurrers to the complaints in the California suits before they sought to obtain an injunction from the United States Court restraining the further prosecution of the California cases. This point, it is said, was not involved in the other cases, and it is argued that the filing of the demurrers in the California cases by appellees waived any objection by them to the jurisdiction of the California Court and gave that Court priority of jurisdiction as against the United States Court.

It may be conceded, for the purposes of this case, that the California Court had concurrent jurisdiction over the United States Court over the subject of the

action, and it may also be conceded that in such a case the rule is that the court first acquiring jurisdiction over the parties, or the property in controversy, is entitled to retain the jurisdiction to the end of the litigation without further interference from any other court. It may also be conceded, for the purposes of this argument, that all the parties to such litigation may by consent give one of the courts having such concurrent jurisdiction preference to the other and by submitting themselves to the jurisdiction of the court thus preferred estopped themselves from endeavoring afterward to transfer the litigation to the other court.

It must be borne in mind, however, that the parties had already submitted themselves to the jurisdiction of the United States Court and that the latter had acquired complete jurisdiction over both the subject matter of the action and the parties thereto long prior to the institution of the suits in the California Court. The suit by Miller and Lux against Thomas B. Rickey and the appellees herein was commenced in the United States Circuit Court June 10th, 1902. Rickey and all of the other parties to that suit had appeared, and the United States Court had obtained jurisdiction, long prior to the commencement of the Mono County suits (146 Fed. 584). Speaking with reference to this point, Judge Hawley said:

> "The fact that some of the cross-bills were not filed until after the service of process was made upon the parties in the Mono County suits is wholly immaterial. The jurisdiction in this court

does not in any manner depend upon the question as to the service of process in the Mono County suits. The only jurisdiction which this court is called upon to assert was obtained in the proceedings had in the suit of Miller and Lux v. Rickey et. al. (No. 731), which was long prior to the commencement of the Mono County suits, as will hereafter more fully appear."

After citing and quoting from many authorities Judge Hawley further said:

"The object and purpose of the Rickey Land and Cattle Company in the commencement in the suits in question in Mono County, Cal., is to take to another court the questions which have long been, and still are, properly in litigation in this court, and this is sought to be done in order to forestall and nullify, if possible, any decision or decree which this court may render regarding issues of which it first obtained full and complete jurisdiction. The impropriety and inadmissibility of such proceedings in the light of the established fundamental rules of our judicial system is manifest. The suits in this court will quiet and settle the title or rights of the respective parties to the flowing waters of Walker River. The enforcement of the rule that the court which first takes jurisdiction of the parties and subject matter if a suit must retain and exercise it to the exclusion of any and all proceedings in other courts until its jurisdiction is exhausted by the final judgment or decree is absolutely essential to the due and proper administration of justice. This duty it owes to itself, as well as to the litigants, in seeing that its own jurisdiction is not impaired. The litigants

have the right to have the case tried in the court where jurisdiction was first obtained, and should not be harassed or annoyed, or compelled to go to another court and there try the identical questions which will properly arise in the court where the suit was originally commenced and is still pending. Such a rule, properly applied, should be rigidly enforced, not only to prevent unseemly conflicts in the court, but to protect the litigants who are properly before this court."

So also this court said when the question came before it:

"As is apparent from the record, the Rickey Land and Cattle Company came into the property rights of Thomas B. Rickey after the suit to quiet title was begun in the Circuit Court for the District of Nevada, and after Rickey had answered therein, and the court had acquired full and complete jurisdiction, both over the subject matter of the suit and over the person of Rickey." (152 Fed. 21).

There then remains the single question whether the fact that certain of the appellees herein filed demurrers to the complaint in the California Court, before they applied to the United States Court for an injunction against further proceedings in the California court, estopped them from the right to apply for such an injunction.

The record in the case at bar shows that one of the grounds of the demurrer interposed by the appellees in the California court, was that the California court did not have jurisdiction. The record does not show,

however, whether the complaint in the California court made any reference to the case then pending in the United States Court. If the complaint in the California court set up sufficient facts to show that the subject matter of the action and the parties thereto, were already subject to the jurisdiction of the United States Court in a suit then pending before it, the lack of jurisdiction in the California court could have been raised by demurrer. If, however, the complaint in the California court was silent as to the case then pending in the United States Court, the question of jurisdiction could not be raised by demurrer. Because of the silence of the record in this respect the only presumption that can be indulged in is that the complaint in the California court did show the pendency of a case, involving the same issues, in the Federal Court, and the demurrers expressly reserved and raised an objection upon that ground.

The demurrers, therefore, did not waive any of the jurisdictional rights of appellees in the California court because, at the threshold of their entrance into that court, they protested against the court's jurisdiction.

If we cannot indulge in any presumption as to the allegations of the complaints in the California court, or if it be assumed that there was nothing in those complaints to show lack of jurisdiction, the question as to jurisdiction could not be raised by demurrer, but could only be raised by answer in the nature of a plea in abatement. Hence the filing of a demurrer,

even though it did not attempt to raise the question of jurisdiction, would not waive the right of the demurring defendant to plead the pendancy of the action in the Federal Court in abatement, when he filed his answer, as it is a self-evident proposition that a right, or privilege, cannot be waived by a failure to assert it until there has been first an opportunity to assert it. As is said in Abbott's Trial Brief (2d Ed.) Vol. 2, p. 976:

> "If a defect of jurisdiction appears upon the face of the complaint, it is generally taken advantage of by demurrer or motion. But when the want of jurisdiction is not thus apparent, the question may be raised by plea in abatement at common law, or by answer under the code procedure. In inferior courts, proof of want of jurisdiction is admissible under the general issue, but in other tribunals, the facts showing a defect of jurisdiction must be specially pleaded."

And again, in the same work, at p. 1199, it is said:

> "It is the better opinion that even in a court of general jurisdiction, while an unqualified appearance waives all objection to jurisdiction founded on the mode or place of service of summons, such objections, not appearing on the face of the complaint, may be taken by answer and are not under the new procedure, waived by being joined with defenses on the merits."

So in the case at bar, appellees would have had the right in the California court, if their demurrers were overruled, to plead the pendency of the case in

the Federal Court as a bar to the suits in the California court. Upon the filing of this plea the California court would doubtless have instructed appellees to call the Federal Court's attention to the matter, if they had not already done so, in order that the latter court might determine whether or not its jurisdiction had been infringed upon by the bringing of the action in the California court; because there is no common arbiter between the State and Federal courts, and comity between them becomes a necessity and becomes a law which cannot be disregarded, and when a Federal Court is first in possession of the subject of the litigation, it must be left to that court to determine when its possession and control of the property are ended, without interference from a State court. (Swinnerton vs. Ore. Pac. Ry., 123 Cal. 417).

Appellees, however, were not bound to wait until their demurrers were overruled and their pleas in abatement filed, before calling the Federal Court's attention to the trespass upon its jurisdiction. On the contrary, it was their duty to call the Federal Court's attention to the matter at the earliest opportunity. This they did—their rights, so far as the California cases were concerned, being protected in the meantime, by filing their demurrers, which was perfectly proper; for as was said in the National Steamship Company vs. Tubman, 106 U. S. 118, "they were not bound to desert the cases in the State Court and let their adversary take judgment by default against them" in that tribunal.

II.

Appellant's argument against the so-called "potential right" of the Federal Court to determine the matters in controversy between appellant and the appellees herein, arising under the latter's cross-bills, prior to the actual filing of the cross-bills and service of process thereon, is based upon the premise, as we understand it, that there cannot be any such thing as potential jurisdiction over any controversy until actual jurisdiction after suit is brought. This may be conceded in the terms stated, but the argument of appellant overlooks, first, the fact that long prior to the commencement of the California suits, the Federal Court had acquired complete jurisdiction of the subject matter and of the parties in the suit of Miller and Lux against Rickey and appellees herein: and, second, the fundamental principle that when a court of equity has once obtained jurisdiction of the subject matter and the parties, it has the power thereafter to do all things necessary to give full redress and render complete justice as between all parties, who are entitled to invoke such power thus existing in the court, by cross-bill, if necessary, against their co-defendants, as well as by an answer praying for affirmative relief against the complainant. The filing of a cross-bill in such a case is not the bringing of a new suit any more than the filing of an answer praying for affirmative relief. The cross-bill is simply ancillary to the suit in which it is filed and the jurisdiction of the court to maintain such a cross-

bill is dependent upon the jurisdiction of the court to maintain the original suit in which it is filed. (146 Fed. 584; 152 Fed. 18 and cases cited).

The argument of appellant, if correct, would give the Federal Court exclusive jurisdiction of all questions of fact and law arising upon the bill of complaint and the answers of the defendants in its court in the case at bar while the state court would have exclusive jurisdiction of all questions of facts and law arising upon the cross bills of defendants and the answers thereto, although all the parties were before both courts and the subject matter of the suits was the same in each court. In this, as in all similar litigation, the questions of law and facts arising upon the complaints, answers and cross-complaints are so interblended that it would be impossible to pass upon one without affecting the others, and the confusion and uncertainty that would result if two separate, independent tribunals should thus attempt to parcel out and settle the controversies involved in the present litigation would be intolerable, and emphasizes the necessity of enforcing in this case, as well as in all others, the rule for which we are contending.

The case of Rodgers, v. Pitt, 96 Fed. 668, cited in appellant's opening brief, does not aid appellant. In that case the action was commenced first in the State Court, but Judge Hawley said: "There is no pretense that the State Court ever acquired any jurisdiction over him (Rodgers) until long after the commencement of the suit and service of the process in this

court'' (p. 671), and in the same case Judge Hawley also said:

> . . there is need of but one trial and the parties should not be compelled to be and appear in both courts at the same time, and litigate substantially the same question. The proceedings in the one court or the other should be stayed at least, until the other has finally disposed of the suit befor it; and then, if any question remains to be disposed of, the other court might be called upon to decide it. Union Mut. Life Ins. Co. v. University of Chicago, (Fed. 443, 447; Foley v. Hartley, 72 Fed. 570, 574; Zimmerman v. So Relle, 25 C. C. A. 518, 80 Fed. 417, 420; Hughes v. Green 28 C. C. A. 537, 84 Fed. 833, 835.''

The facts in Rodgers v. Pitt, supra, were much stronger in favor of the State Court's jurisdiction, than in the case at bar, but the right to maintain the action in the State Court was nevertheless denied. The quotation from Judge Hawley's opinion in appellant's brief is not applicable to the facts here. It would seem from Judge Hawley's opinion that all the parties in the Rodger case had submitted themselves, without objection, to the jurisdiction of his court, and made no objection thereafter until they obtained what they deemed an adverse ruling on the merits, and then endeavored to change the place of trial to the State Court. (p. 676); but aside from this, no lis pendens had been filed in the State Court, and this Court, upon appeal, held that Rodgers, who was a subsequent purchaser from one of the parties in the State Court, and who had no knowledge of the pen-

dency of the action, was not bound by the action in the State Court (Pitt v. Rodgers 104 Fed. 397). This, however, will not aid appellant here, as the latter is not an innocent purchaser from Rickey (146 Fed. 584; 152 Fed. 18); but even if it were, it was bound, under the doctrine of lis pendens, in the Federal Courts, from the time the process was served upon Rickey in the suit brought against him by Miller and Lux in the Federal Court (Bates Fed. Proc. Sec. 613; 146 Fed. 584; 152 Fed. 584).

Respectfully submitted,

MACK & SHOUP and
GEO. S. GREEN,

Solicitors for Appellees.

No. 1372

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

RICKEY LAND AND CATTLE COMPANY (a Corporation),

Appellant,

vs.

JAMES NICHOL, F. FEIGENSPAN, ANGUS McLEOD, MARY T. SHAW, DeWITT CROWNINSHIELD, M. J. GREEN, C. F. MEISSNER, HAMILTON WISE, J. F. HOLLAND, C. F. HOLLAND, THOS. HALL, E. S. CROSS, D. J. BUTLER, J. S. SWEETMAN, JOHN COMPSTON, J. C. MILLS, A. W. GREEN, and SPRAGG-WOODCOCK DITCH COMPANY (a Corporation),

Appellees.

Argument of Chas. C. Boynton for Appellant.

JAS. F. PECK,
CHAS. C. BOYNTON,
Solicitors for Appellant.

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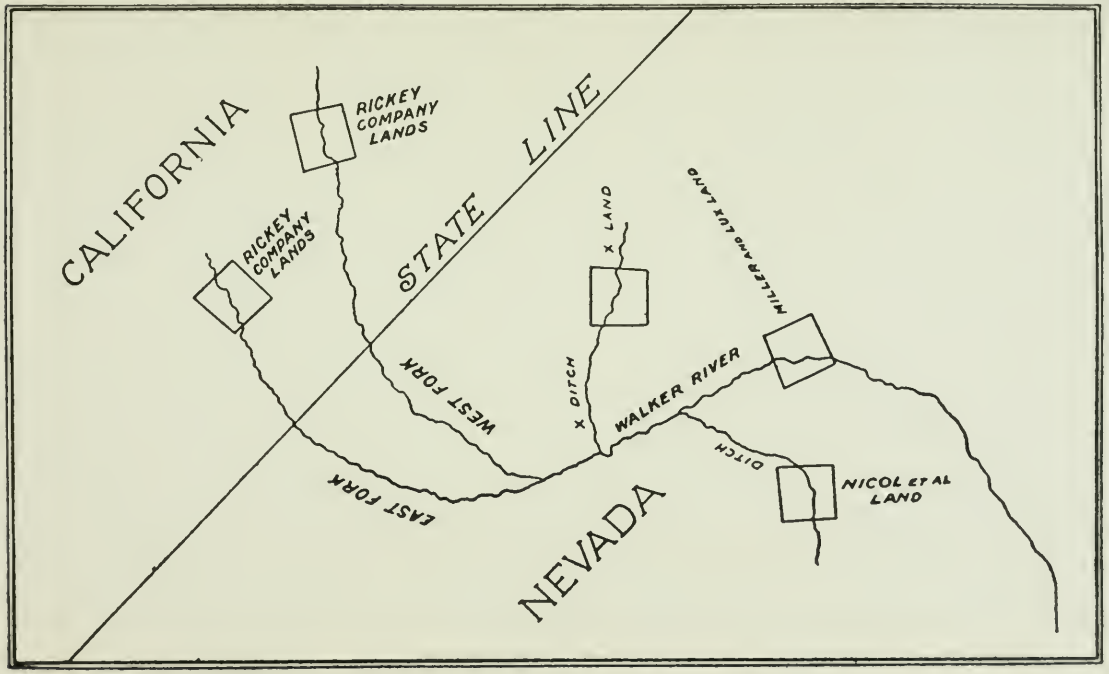
CALIFORNIA
STATE LINE
NEVADA
RICKEY COMPANY LANDS
RICKEY COMPANY LANDS
X LAND
MILLER AND LUX LAND
WEST FORK
EAST FORK
X DITCH
WALKER RIVER
DITCH
NICOL ET AL LAND

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

RICKEY LAND AND CATTLE COMPANY (a Corporation),
Appellant,

vs.

JAMES NICHOL, F. FEIGENSPAN, ANGUS McLEOD, MARY T. SHAW, DeWITT CROWNINSHIELD, M. J. GREEN, C. F. MEISSNER, HAMILTON WISE, J. F. HOLLAND, C. F. HOLLAND, THOS. HALL, E. S. CROSS, D. J. BUTLER, J. S. SWEETMAN, JOHN COMPSTON, J. C. MILLS, A. W. GREEN, and SPRAGG-WOODCOCK DITCH COMPANY (a Corporation),
Appellees.

No. 1372.

ARGUMENT OF CHAS. C. BOYNTON FOR APPELLANT.

This is an appeal from an interlocutory decree made by the United States Circuit Court for the District of

Nevada, enjoining appellants from prosecuting two certain suits in Mono County, California, on the ground that the necessary effect of the prosecution of said suits would be to bring on for trial and determination the same issues as subsequently were presented by certain cross-bills filed by appellees in a suit theretofore pending in the United States Circuit Court for the District of Nevada, and thereby interfere with and defeat the jurisdiction of the said United States Court.

For the purpose of simplifying the statement of the facts herein, we have prepared the accompanying plat of the properties involved in this litigation. The Walker River, it will be observed, rises in two branches, known as the East Fork and the West Fork, in the State of California, and flows through the eastern part of that State into and through the western part of the State of Nevada, to a point where the two branches join to form the main river, which flows on through the State of Nevada. Appellant owns two tracts of land in the State of California, marked on the plat, Rickey Company lands, which said tracts of land are each riparian to a branch of the Walker River in that State. Appellant claims a right to certain definite quantities of the waters of each branch of said river within the State of California to irrigate its lands in the State of California (Trans., p. 8 to 14).

Miller & Lux, a corporation of California, owns certain lands on the main Walker River in the State of Nevada, noted in plat as Miller & Lux land, and claims

a right to a certain definite quantity of the waters of the said river in the State of Nevada to irrigate the said lands (Trans., p. 5). Appellees own certain lands, in the State of Nevada, marked on the plat Nichol, et al., land, lying somewhat higher up on the stream than the lands of Miller & Lux, and claim a right to divert waters from the said Walker River in the State of Nevada for the purpose of irrigating these lands (Trans., p. 14-15). Both appellees and appellant herein are citizens of the State of Nevada.

On July 10, 1902, Miller & Lux, a citizen of California, commenced an action in the United States Circuit Court for the District of Nevada against one hundred and thirty-seven citizens of Nevada, including appellees and one T. B. Rickey, who was the predecessor in interest of the Rickey Land and Cattle Company, and alleged that it was the owner, by appropriation, of certain interests in the waters of the Walker River in the State of Nevada (Trans., p. 5), and sought to enjoin the defendants in that action from diverting the water from the Walker River and depriving it of water to which it was entitled.

On October 15, 1904, the Rickey Land and Cattle Company, which, theretofore, on August 6, 1902, had purchased from Mr. Rickey his lands and water rights in the State of California, commenced two ~~certain~~ actions in the Superior Court of Mono County, California, against Miller and Lux and appellees, wherein it alleged that it was the owner of the

right to divert and appropriate certain waters of the Walker River in the State of California (Trans., p. 9), and sought to quiet its titles to its water rights in the Walker River in the State of California. It is to be observed that the issues presented by these actions commenced in the State of California were as to the ownership and title of appellant to the right to divert water from the Walker River in California. Summons was served on the appellees herein and the appellees herein appeared in said actions in said Superior Court of California and filed general demurrers in said last mentioned actions on or before December 28, 1904 (Trans., p. 29).

Subsequent thereto, and on the 5th day of January, 1905, appellees herein filed cross-bills against T. B. Rickey in the original action commenced by Miller & Lux in the United States Circuit Court for the District of Nevada (Trans., p. 14). Appellees alleged in said cross-bills that they owned certain rights and appropriations in the waters of the Walker River, on which rights their co-defendant, T. B. Rickey, was trespassing. Wherefore, an injunction was prayed. It is to be observed that the issues presented by these cross-bills were as to the ownership and title of appellees to the right to divert water from the Walker River in Nevada.

At this point we feel bound to call this Court's attention to the fact that the complaint filed herein fails to state that the rights and appropriations of the waters of the Walker River claimed to be owned by appellees

are alleged by the cross-bills to exist in the State and district of Nevada. As it appears from the complaint herein that the Walker River flows partly in the State of California, and partly in the State of Nevada (Trans., p. 10), the complaint, in failing to allege that the rights claimed by appellees were alleged in said cross-bills to exist in the State of Nevada, failed to affirmatively show that the Circuit Court of the District of Nevada had any jurisdiction over the subject matter of said cross-bills and of the issues presented thereby, as, obviously, the Nevada Court has no jurisdiction over a controversy between rival claimants of rights to that portion of the stream that flows entirely in California. *Conant* vs. *Deep Creek Irr. co.,* 23 Utah, 627; 66 Pac., 188. This insufficiency in the bill herein warrants a reversal of the decree, but we do not desire to insist on this point, as the cross-bills did in fact allege that these rights and appropriations existed in the Walker River in the State of Nevada, and if the case went back on this point, appellees would simply amend and bring the case up again, wherefore, we prefer to treat the allegation of the bill herein as showing what the cross-bills really did allege.

The subpoenas issued on said cross-bills were served on said Rickey on or about the 5th day of January, 1905 (Trans., p. 16), and immediately thereafter this action was begun to enjoin appellant herein from further prosecuting said actions in the Superior Court of Mono County, State of California, on the ground that the nec-

essary effect of said last mentioned actions was to bring on for trial and determination in said Superior Court the same issues as presented by said cross-bills filed in said original action of Miller & Lux vs. T. B. Rickey, and obtain from said Superior Court a judgment determining said issues in advance of any determination thereof by the Court under the cross-bills in the original action, and thereby defeat the jurisdiction of the said United States Court (Trans., p. 16). An interlocutory order and decree, restraining appellants herein from prosecuting said actions in the California Court was thereafter entered (Trans., p. 57), and from such order and decree this appeal is taken.

Appellant desires to present two grounds wherefor said interlocutory order and decree should be reversed.

First: *The issues presented by the cases brought in the Superior Court of California are not the same issues as those presented by the cross-bills filed in the United States Circuit Court for the District of Nevada.*

Second: *Assuming that the issues presented by the actions commenced by appellant in the Superior Court of California are the same issues as presented by the cross-bills filed in the United States Circuit Court for the District of Nevada, yet as appellees herein were served with summons and made a general appearance in said actions in California by filing demurrers therein before they filed said cross-bills, or commenced this ac-*

tion, they thereby waived any right to object to the prosecution of the said actions in California.

These two points will be considered in their order.

I.

It is observed that the questions involved in point one were decided adversely to appellant's contention in the case of the *Rickey Land and Cattle Company* vs. *Miller & Lux,* 152 Fed., 11, recently decided by this Court. In arguing this point, we shall take the liberty to briefly comment on that decision and its application to this case.

The ground on which the injunction was granted in the Court below was, that the issues tendered by the actions commenced in the Superior Court of California were the same issues as were presented by the cross-bills of appellees in the action of *Miller & Lux* vs. *Rickey et al.* This, we contend, was error. Both the action commenced by Miller & Lux in the State of Nevada, and the action commenced by the Rickey Land and Cattle Company in the State of California, were actions to quiet title to certain specific property in the complaints described. The issues, therefore, in each of the said actions were as to the title to the specific property in the complaints described, which property constituted the subject matter of the respective actions. It is clear, therefore, that if all the property constituting the subject matter of the actions commenced in

Mono County, California, was different and distinct property from that which constituted the subject matter of the action in Nevada, then the issues made, as to the title to the property that constituted the subject matter of the actions in California were necessarily not the same issues that were made as to the title to property which constituted the subject matter of the cross-bills in the action in Nevada. In other words, the decree herein is sustainable only on the ground that the subject matter, or some portion of the subject matter, of the actions commenced in California is likewise a subject matter of the cross-bills filed in the State of Nevada. Thus, as the actions are local actions, there must exist in all these actions a common subject matter over which the Court in Nevada and the Court in California have concurrent jurisdiction; for if either Court lacks jurisdiction over the subject matter of the action pending in the other Court, there cannot exist in that Court an issue as to the title of that subject matter which is sought to be established in the other Court, and thus the issues in the two actions cannot be the same and the injunction herein was improperly granted.

To that end, it behooves us, at the outset, to examine and find out the subject matter of these respective actions commenced in the Courts of these respective States. *The subject matter of the action commenced by appellant in the State of California is the right to divert and appropriate certain of the waters of the Walker River in the State of California* (Trans., p. 9).

The actions commenced by the Rickey Land and Cattle Company in the Superior Court of Mono County, State of California, were to quiet the titles of that corporation to its water rights and appropriations from the Walker River in the State of California. It will readily be observed that the jurisdiction of the said Superior Court in the State of California in those actions was, of necessity, confined to a determination of rights existing in the stream in the State of California. The California Court had no jurisdiction to determine any rights in the Walker River in the State of Nevada, or between claimants of rights in the Walker River in the State of Nevada.

Conant vs. *Deep Creek Irrigation Co.,* 23 Utah, 627; 66 Pac., 188;
Lamson vs. *Vailes,* 27 Colo., 201; 61 Pac., 231.

The fact that certain persons, residents of Nevada, were made defendants in the California actions could not give the California Court any jurisdiction over any property, in the stream or otherwise, lying in the State of Nevada, or outside of the State of California; and the fact that defendants in said actions may have owned, or claimed to own, property in the Walker River in the State of Nevada, and, so owning, or claiming to own, property, had appeared in the California Court, could not give the last mentioned Court jurisdiction over those property rights in the State of Nevada. That was the very point met and decided in the *Conant* case. The

jurisdiction of the California Court is confined exclusively, and of necessity, to the California portion of the stream, and the action was commenced against appellees herein on the ground that they claimed an interest in said Walker River, not in the State of Nevada, but in the State of California, which was adverse to the Rickey Land and Cattle Company. The California Court obviously had no jurisdiction to determine as to any interest in the Walker River which citizens of Nevada or citizens of California claimed in the Walker River in the State of Nevada, but the California Court did have jurisdiction to determine as to interests in the stream in the State of California, whether the same were claimed by citizens of the State of California, or of the State of Nevada. The subject matter of the actions commenced in the Superior Court of the State of California was the water right of the Rickey Land and Cattle Company existing in that stream in the State of California. The fact that that stream flowed out of the State of California into the State of Nevada did not extend the jurisdiction of the California Court. It extended to the boundary line separating the State of Nevada from the State of California, and there it stopped, just as effectually as would have been the case were the State of Nevada a foreign country.

As above noted, the allegation of appellees' bill of complaint herein, on which the injunction is based, is that "The necessary effect of said actions brought by " appellant in Mono County, California, is to bring on

" for trial and determination in said Superior Court the " same issues as presented by the cross-bills of com- " plaint of your orators in the said suit of *Miller & Lux* " vs. *T. B. Rickey et al.,* theretofore brought and pend- " ing in the United States Circuit Court for the District " of Nevada" (Trans., p. 17).

It is clear and plain that the only issues made or presented by the actions commenced in the Superior Court of Mono County pertained to property rights and water rights existing exclusively in the said County of Mono, State of California; therefore if these issues are the same issues as were presented by the cross-bills in the original action commenced in the State of Nevada, then a portion, at least, of the subject matter of the said cross-bills filed in the Nevada Court must have been these very property rights existing in the State of California.

This, we contend, is impossible. We contend that it is no more possible for an action to quiet title commenced in the State of Nevada to have for its subject matter property situated outside of the State of Nevada, and in the State of California, than it is for these actions commenced in the State of California to have for their subject matter property situated outside of the State of California, and in the State of Nevada.

In other words, our contentions are, that the subject matter of the actions commenced in the State of Nevada was confined to rights existing in the stream in the State of Nevada. We do not question the jurisdiction of the United States Circuit Court for the District of Nevada

to absolutely determine and quiet appellees' titles and rights in the Walker River in the State of Nevada, as against citizens of the State of California as well as citizens of the State of Nevada, but we do question and deny that the United States Circuit Court sitting in the District of Nevada, or any other Court sitting in the State of Nevada, can determine or quiet any titles to water or any other real property of Miller & Lux or appellees herein, situated in the State of California. The fact that the stream in which these rights are claimed to exist rises in the State of California and flows into the State of Nevada cannot amplify the jurisdiction of the Nevada Court and empower it to extend up the stream across the boundary of the two States and determine questions as to the title and water right in that portion of the stream which is, and exists, in the State of California, and wholly outside of the State of Nevada.

In brief, appellant's contention is, that the subject matter of the original action filed by Miller & Lux in the United States Circuit Court for the District of Nevada, and of the cross-bills filed by appellees in said action, was confined to the rights of said Miller & Lux and appellees in said Walker River in the State of Nevada. If appellees or Miller & Lux have any rights in the said stream in the State of California by virtue of their appropriations and usure from the stream in the State of Nevada, these rights in the State of California are beyond the jurisdiction of the United States Circuit

Court for the District of Nevada, and can be protected by, and are, exclusively within the jurisdiction of the Courts of the State of California.

The application of this rule hereto might be more plain if appellees affirmatively alleged their rights to be in California. Suppose appellees should change their point of diversion and place of use of this appropriation to lands in the State of California, they would acquire no new rights in the stream in California. They then very obviously would be exercising rights in the stream in California—no new rights, but rights they now have—but rights which the Nevada courts, either Federal or State, can not protect.

In other words, we contend that the United States Circuit Court for the District of Nevada has no more jurisdiction to quiet and establish any rights that appellees may have in the Walker River in the State of California than the Court of Mono County, California, has to quiet and establish rights that the Rickey Land and Cattle Company may claim to have in the Nevada portion of the stream. Both actions are local and the subject matter of the Nevada action exists exclusively in the State of Nevada, and the subject matter of the California action exists exclusively in the State of California. One action is local to the State of California, and the other is local to the State of Nevada. Therefore, the subject matter of these actions being different, the issues, which are as to the titles of these respective subject matters, can not be the same, and the foun-

dation on which rests the decree appealed from does not exist.

CONTENTIONS IN SUPPORT OF DECREE.

The assertion that the necessary effect of the actions commenced by appellant in Mono County is to bring on for trial and determination in the California Superior Court the same issues as presented by the said cross-bills of appellees herein, filed in the original action of *Miller & Lux* vs. *T. B. Rickey et al.,* is sought to be supported by two distinct lines of argument.

One argument is based on the proposition that the subject matter of the cross-bills filed by appellees is an interest in the entire stream of the Walker River, both in Nevada and California.

The other argument is based on the proposition that the subject matter of the cross-bills is the land, or an interest or right in the land, on which appellees claim the right to use the water. We will discuss these two arguments in their order.

We also contend that the subject matters of the cross-bills filed in the action commenced in Nevada and of the two actions commenced in California, are interests or rights in the stream, but our contention is further that the subject matter of the cross-bills filed in the action commenced in Nevada is confined to an interest or right in that part or portion of the stream which flows in the State of Nevada, and that the subject matter of the actions commenced in California is confined to an

interest in that part or portion of the stream which flows in the State of California. This conception of the subject matters of the two actions removes all possibility of any conflict of issues, as there is no common subject matter, the title of which is an issue in the two suits, the issues in one suit being confined to a subject matter wholly in California, and the issues in the other suit being confined to another subject matter wholly in the State of Nevada.

But it was argued before this Court that a stream flowing from one State into another is, by its very nature, an indivisible *res,* and being indivisible, and flowing in two States, it is just as much in one State as it is in the other State, and thus the courts of either State have concurrent jurisdiction over it.

No authorities are cited in support of this argument. We submit that it is unsound. A stream is no more indivisible than a piece of real estate, a roadway or railway, existing partly in one State and partly in another State. A railway running from one State into another or a road running from one State into another is in its nature just as indivisible as a stream running from one State into another, yet no court in a local action over a railroad or a wagon road in one tSate has held that it had jurisdiction over the railroad or a wagonroad in the other State by reason of the indivisible nature of the road or railway. The insufficiency of this argument based on the indivisible nature of a stream is clear-

ly set out by the case of *Miss. & Mo. R. R. Co.* vs. *Ward*, 67 U. S., 485.

Complainant in this action was the owner of steamboats navigating the Mississippi River and the action was commenced in the United States Circuit Court for the district of Iowa for a mandatory injunction to enjoin the maintenance of a bridge across the Mississippi River from the State of Iowa into the State of Illinois, and to abate the same as a nuisance. The piers of the bridge created eddies in the stream and obstructed navigation and thus interfered with the plaintiff's right to navigate the stream.

It will be observed that the boundary line dividing the States of Illinois and Iowa is the center of the Mississippi River and thus one-half of the stream and one-half of the bridge only were within the territorial limits of the jurisdiction of the United States Circuit Court for the district of Iowa. But if the stream is an indivisible thing, as was argued by counsel in the Miller & Lux case, there plainly could be no objection to the jurisdiction of the Circuit Court for the district of Iowa on the ground that one-half of the stream and one-half of the bridge were in the State of Illinois; but the Supreme Court of the United States did not view either the bridge or the stream as indivisible, and held that the boundary line of the State of Iowa was the limit of the court's jurisdiction, and thus determined that the court could neither inquire into, or adjudicate, concerning rights in the stream or the effect of the

bridge on the Illinois side, although it affirmatively appeared that one of the piers of the Illinois side created an eddy that obstructed navigation on the Iowa side of the river.

The absolute definite limitation of the power of the United States Circuit Court for the district of Iowa to make inquiry and act on facts existing only in the Iowa side of the river, and its absolute inability to inquire into the effect of the Illinois portion of the bridge as an obstruction to navigation, is set forth clearly in the following language:

> "This is a question that we cannot examine nor reach by a decree, as the relief suggested is clearly beyond our power in this suit. Congress could extend the jurisdiction of the Federal Courts across the Mississippi River by enlarging the Judicial district on either side, or it could confer concurrent jurisdiction on adjoining districts extending to trespasses and torts committed within the shores of the river. But the courts of justice can not do it unless authorized by an act of Congress."

Again, Mr. Justice Nelson, while dissenting from the majority opinion of the Court, which determined not to take any action in the premises by reason of the fact that it was powerless to reach the entire bridge, and thus dismissed the bill, agreed with the Court that the jurisdiction of the Circuit Court of Iowa was limited to that part of the bridge existing in the State of Iowa and used the following language:

"The east line of the State of Iowa, and which constitutes the boundary of the district of the Federal Court, and, of course, of its jurisdiction, is the middle of the Mississippi River; and the same line constitutes the west boundary of the State of Illinois, and, of course, the limit of the jurisdiction of the Federal Court in that State. One moiety, therefore, of the bed of this river is embraced within the local jurisdiction of this court for the district of Iowa, and the other moiety within the jurisdiction of the court for the district of Illinois. Neither court possesses any local jurisdiction over the entire river, and hence the idea that neither court is competent or equal to deal with the obstruction; and especially that the court in the Iowa district can not deal with it on the Illinois side; and for the same reason the court in the Illinois district could not, if the suit was in that court, deal with it on the Iowa side."

As stated above, nothing can be conceived of as much more indivisible than a bridge, for divide a bridge and it is no longer a bridge, and in this case the stream of the Mississippi River was involved just as much as the bridge. The damage on which the action was based was produced by eddies in the river caused by the piers in the bridge; some of the piers being on the Illinois side, and some on the Iowa side. The true cause of the damage was the eddies in the stream, yet the Court held that the stream and its eddies was, as far as the jurisdiction of the court was concerned, abso-

lutely divided by the boundary line in the center of the stream.

It has been contended as distinguishing this case that this action being one to abate a nuisance the court was required to act on the object, which it could not where the object was outside the territorial limits of the court's jurisdiction. *But this is the very test of a court's jurisdiction over a subject matter—the power of the court to act on the res.*

This case stands as unquestioned authority and as good law today as when pronounced. Therefore there is no foundation for the argument that by reason of the indivisible nature of the stream, being partly in one State and partly in the other, the courts of both States have concurrent jurisdiction over the entire stream, and that thus an action may be commenced in the courts of one State to quiet title to an interest in the stream flowing in that State that will have the same subject matter and issues as an action commenced in the courts of the other State to quiet title to an interest in the stream in that State.

The argument based on the indivisible nature of the stream, and therefore the jurisdiction of the Nevada court over the entire stream, in California as well as in Nevada, was the main one urged by Miller & Lux in the case heretofore decided by this Court of the *Rickey Land and Cattle Company* vs. *Miller & Lux*, but this Court, in rendering its decision, took no notice of this line of argument and gave no weight thereto.

The second argument, namely, that the real subject matter of the action commenced in Nevada, was the land of Miller & Lux, which was deprived of the water, was adopted by this Court in rendering its decision and seems to have been made a basis for the decision rendered by this Court in the said case of the *Rickey Land and Cattle Company* vs. *Miller & Lux.*

This Court, after laying down the proposition that the original action commenced by Miller & Lux against T. B. Rickey *et al.,* was in the nature of an action to quiet title to real estate, continued:

> "Although the right to have the water of Walker River flow from above down to and within the complainant's canals and ditches, for use upon its lands, is an incorporeal hereditament, it is, nevertheless, under the foregoing authorities, *appurtenant to the realty in connection with which the use is applied. It savors of, and is a part of, the realty itself.* The suit, therefore, in its purpose and effect, *is one to quiet title to realty.* Complainant's diversion being in Nevada, and the use being upon *realty situated in Nevada,* and the suit being one *concerning or pertaining to that realty,* it is necessarily local in character and was properly instituted in the State of Nevada. See *Conant* vs. *Deep Creek, etc., Company, supra.* The proposition seems so clear that it is scarcely necessary to cite other authorities in its support. And it is equally clear that the courts of one State are without jurisdiction to hear and determine suits instituted in another for the adjustment of adverse claims respecting the

legal title to realty, and which pertain to the realty as the subject matter of the controversy." (Italics ours.)

While we do not agree with the definition of the subject matter of the original action of *Miller & Lux* vs. *T. B. Rickey et al.,* as set out in the above quotation, there is nothing therein that conflicts with any contention urged by appellant herein, or, for that matter, with any contention that was urged by appellant in the case of *Rickey Land and Cattle Company* vs. *Miller & Lux.*

To the contrary we respectfully submit that the very definition of the subject matter of the Nevada actions as something concerning or pertaining to some right or interest in the lands in Nevada, precludes any possibility for the same issues to be presented in the California action as presented in the Nevada action, for by no possibility could the California action present any issue as this subject matter.

Thus let us assume that the action commenced in the United States Circuit Court for the district of Nevada was "one concerning or pertaining to that realty," namely, the lands of cross-complainants in Nevada, and thus had as its subject matter those lands or some interest or right in those lands. The subject matter was, as the Court says, "necessarily local in character," and local to Nevada. If the land, or something that concerns or pertains to the land in Nevada, is the subject

matter of the Nevada action, the issues of the Nevada action are as to the title to this *res,* that is some interest in this land or part or parcel of this land in Nevada, and thus by no possibility could these same issues be presented by the actions commenced in California. The California court has no jurisdiction over this *res* in Nevada and could entertain no issues as to its title. Thus it follows, from the very rule laid down by this Court, that it would be absolutely impossible to present the same issues in the action in California as were presented by the cross-bills.

But, in order that the law governing this case may be clear, we respectfully submit that the property right, a portion of which is the subject matter of the cross-bill, is not the land, or anything that is part or parcel of or that necessarily inheres or pertains to the land or any interest in the land of cross-complainants in the State of Nevada, but is a right and interest in the water of the entire stream of the Walker River, independent of and not tied to or necessarily connected with any particular piece of land or the title to any piece of land, a part of which right exists in the stream in the State of Nevada and a part of which exists in the stream in the State of California. While the action was one to quiet title, and to quiet title to realty, the realty, the title of which was to be quieted, was not the lands on which the water happened to be being used at the time the bill was filed, or any interest in these lands, but was a water right in the stream.

We respectfully submit that the subject matter of the action commenced by Miller & Lux in the United States Circuit Court for the district of Nevada was the water right, or right to the waters of the Walker River, claimed to be owned by said Miller & Lux, and likewise the subject matter of the cross-bills filed by appellees in the said action pending in the United States Circuit Court for the District of Nevada was the water right, or right to use the waters of the Walker River, claimed to be owned by appellees, and not anything that necessarily savored of, or was part and parcel of the said Miller & Lux and appellees' lands in Nevada, or that necessarily concerned or pertained to those lands, as their subject matter.

Take the description of the subject matter of appellees' cross-complaints as set out in the complaint herein. It is in the following language: "*Said cross-bills* " *alleged, among other things, that they were, and for* " *a long time prior to that time had been, the owners* " *of certain rights in the waters of the said Walker* " *River and certain appropriations made by them and* " *their grantors and predecessors in interest.*" (Trans., pp. 14-15.) Nothing is said about any lands of cross-complainants. The subject matter as set out in the cross-complaint is simply, "*Certain rights in the waters* " *of the said Walker River and certain appropriations* " *therein.*"

But even if appellees had mentioned their lands in connection with their water right, that would not have

altered the nature of the subject matter which appellees sought to protect and have the title to quieted, when they filed the cross-bills in said action in Nevada. A water right acquired by the appropriator is not necessarily appurtenant to any particular piece of land in connection with which it is used. Nor can it be considered as a part of the land for the purposes of an action to establish or to quiet its title.

No rule of law is better established than that an appropriator may change his point of diversion and place of use of the water at will. He may use the water on these lands today, and then use the right in connection with, and for the benefit of, other lands tomorrow, without in any manner impairing or losing his right.

Hargrave vs. *Cook,* 108 Cal., 80.
Kidd vs. Laird, 15 Cal., 180.
Davis vs. *Gale,* 32 Cal., 26.

But let us assume that a water right is "a part of the " realty itself," to which it is appurtenant; then, if that is the case, an appropriator who has obtained a decree quieting, establishing, and protecting his title to a water right used on certain lands, would immediately lose the benefit of his decree should he change his place of usure and apply the water to other and different lands than those to which his right was quieted as a part thereof. That is to say, to turn to the plat heretofore referred to, assume that Nichol *et al.,* appellees herein, obtain a decree establishing their title to waters appro-

priated and used on the lands indicated on said plat as "land of Nichol *et al.*" If the subject matter the title to which has been established by that decree is parcel of those lands and is one concerning or pertaining to those lands, then, should Nichol *et al.,* thereafter decide to change their place of usure of said water and use it on the tract of land indicated on the plat as "X land," they would forfeit all benefits of any decree obtained. It is obvious that a decree establishing and protecting something that is parcel of, or which necessarily pertains to or concerns the tract of land described as Nichol land could not be relied upon to protect an interest that necessarily savors of and is a part of an entirely different tract of land, designated as "X land." Yet no one would contend that an appropriator would lose the benefit of a decree establishing his right by simply changing his place of usure.

Thus it is clear that the water right in the stream is the principal thing, and the lands on which, or for the benefit of which, the water may happen to be being used at the time the action is commenced, is merely an incident. Thus it was said by the Supreme Court of the State of California in the case of *Jacobs* vs. *Lorenze,* 98 Cal., p. 340-341, "appellant's contention that the wa-
" ter right *must be* appurtenant to a certain ditch, is
" not sound. The water right is the principal thing,
" and if either is appurtenant to the other, the ditch is
" appurtenant to the water right, and as the water

"may be used through any ditch, the question be-
"comes unimportant."

The subject mattter to be protected was the right in the stream. The lands described in the complaint are merely incidental to the right. It is true a man can not acquire a water right without putting the water to a beneficial use on certain lands, but the lands and the use of the water come into the case merely as evidentiary matter to establish the right. A water right is acquired by a beneficial use on lands. A water right is proved in a court by proving a beneficial use of the water. The ultimate fact in the case is the application of the water to a beneficial use. The evidentiary facts consist of lands, and the economical and beneficial application of the water on the lands. It is not even essential that the man acquiring the water right own any interest or title in the lands on which the water is used, and by virtue of the use of which he acquires the right.

De Necochea vs. *Curtis,* 80 Cal., 397.
Ramelli vs. *Irish*, 96 Cal., 214.

In *Davis* vs. *Gale*, 32 Cal., 26, the rule is thus laid down:

> "Appropriation and use of water for beneficial purposes are the tests of right in such cases, and not the place and character of the particular use."

"Appropriation, use, and non-use are the tests of the right."

Mitchell vs. *Canal Co.,* 75 Cal., 464.

Thus it is clear, that except as a matter of evidence as one of the probative facts essential to the proof of the beneficial use of the water of a stream, the existence of the particular lands on which the water is used is immaterial. The essential thing to be established and protected is the water right. The subject matter of the action is the exclusive right to take a specific quantity of water from the stream, not at a particular point, or for the benefit of, or to be used upon, any particular tract of land or lands, but upon any land, or at any point on the stream, as the owner of the right may desire.

We respectfully submit that the doctrine announced in the case of *Rickey Land and Cattle Company* vs. *Miller & Lux,* that the subject matter of an action brought by an appropriator of water to protect his water right is something that *savors* of and is a *part* of the land, or is *concerning* or *pertaining to the land,* is without foundation in precedent, or authority. All authorities are that a water right is an interest in a stream from its source to its mouth. As was said in the case of *Cole* vs. *Richards Irrigation Co.,* 75 Pac. (Utah), 378:

"It is settled in this arid region by abundant authority that when the waters of a natural stream

> have been appropriated according to law, and put to a beneficial use, the rights thus acquired, carry with them an interest in the stream from the points where the waters are diverted from the natural channel to the source from which the supply is obtained, and any interference with the stream by a party having no interest therein, that materially deteriorates the water in quantity and quality previously appropriated, to the damage of those entitled to its use, is unlawful and actionable."

To sustain the decree herein this Court must hold that the subject matter of the cross-bills filed by appellees in the original action brought by Miller & Lux in the United States Circuit Court for the district of Nevada was an interest in the stream of the Walker River, both in the State of California and in the State of Nevada, and that the Nevada court had jurisdiction over the interests in the stream in California as well as the interest in the stream in Nevada. We do not question the power of the United States Circuit Court for the district of Nevada to protect and establish and quiet the title to any interest in the stream that may exist in the State of Nevada, but we do unequivocally deny the power of that court to adjudicate any interest that Miller & Lux may claim in the stream in the State of California. This is the function of the California courts, either State or Federal.

As above noted, there is no room for any conflict of jurisdiction over this stream and property therein, in

the courts of the respective States. The courts of one State have jurisdiction over that part of the stream which exists in that State, and the courts of the other State have jurisdiction over the rights in that part of the stream that exists in that State. There being no concurrent jurisdiction, there is no possibility for a conflict.

The issues made in the action in the courts of California pertain to a subject matter, rights in a stream, in California, and issues made in the courts of Nevada pertain to another and distinct subject matter, namely, rights in the stream in the State of Nevada. Thus the issues are no more the same issues than are the issues in any two cases involving distinct property and subject matter, the same issues.

The fact that the actions brought by appellant in Mono County are to quiet and establish the Rickey Land and Cattle Company's right to divert water from the Walker River in the State of California, together with the fact that as a result of appellant's diversion of water from the stream in California the appellees may not be able to divert the amount of water from said stream in Nevada that they are entitled to, does not cause the subject matter and issues of the actions in California, which are the rights in the stream in California, to become the same subject matter and issues that are presented by the cross-bills filed in the action in Nevada. It is true that the subject matter of these

two actions, in California and Nevada, respectively, is quite closely related, inasmuch as the flow of the stream in Nevada is dependent upon the flow of the stream in the State of California, but that dependency does not make them one and the same. This argument is simply that of the indivisible *res* over which both courts have concurrent jurisdiction, which is clearly to the contrary of the decision in the case of *Miss. & Missouri R. R. Co.* vs. *Ward, supra.*

An unlawful diversion in California diminishes appellees' rights in the stream, both in Nevada and California, lessening the flow of the stream in California, and as a consequence, lessening the flow of the stream in Nevada. Violating and injuring appellees' rights in the stream in the State of California may cause undoubtedly a resultant injury to appellees' rights in the State of Nevada, but that does not change the location of the rights that are directly injured by appellant. The right of the appropriator is to have the water flow uninterrupted down the stream to the point where he desires to divert it. It exists in the stream right up to the source and is there absolutely fixed at all times, and as the water flows down to the appropriator's point of diversion, it flows subject to this right. Appellant's diversion in California if a trespass, is one committed on appellees' rights to have the water flow down this stream in California toward their point of diversion. There is the direct injury, and there is where appellees must have protection irrespective of

whether they desire to divert the water from the California or the Nevada portion of the stream. If appellees can protect their rights in California, then they may receive the amount of water they are entitled to and desire to divert in the State of Nevada at the State line dividing the two States.

If the water is diverted by trespassers before it reaches the appropriator's point of diversion, the direct injury to the right to have the water flow down the stream occurs right at the point where the trespass occurs. As a result of that direct injury there may be a series of consequential injuries extending on down the stream, as there is less water in the stream to divert lower down; smaller crops on the land where the appropriator may use the water; less work for the farmer and his hired men; less clothes, food, and luxuries for the farmer's family and himself; less beef or potatoes for the inhabitants of cities, and consequently more hunger; and so the chain of consequential injuries may be traced, but the direct injury is to the right to have the water flow uninterrupted down the stream, which right exists in the stream from its source down to the appropriator's point of diversion.

Thus appellant's action to quiet title to its rights in the stream in California, if it affect appellees' right in the stream, affects solely the right which appellees have in the stream in the State of California, and the fact that as a result of appellees' losing this right in the stream in the State of California they may be un-

able to enjoy the same privileges that they may have been enjoying, or are entitled to enjoy in the stream, in the State of Nevada, does not change the location of the rights of appellee involved in the California action from the State of California into the State of Nevada.

Appellees' rights that are directly affected by the California actions are rights to have the water flow uninterrupted down the stream in the State of California toward the place where appellees may desire to divert the water whether in California or Nevada. For instance, supposing that appellees, instead of desiring to appropriate this water in the State of Nevada, desire to appropriate it in the State of California. This, as we have pointed out above, may be the fact in this case, as appellees nowhere set out herein where they desire to divert the water, the right to which they are seeking to protect by the cross-bills. From the complaint herein, as above noted, it simply appears that the Walker River flows through and out of the State of California into and through the State of Nevada, and appellees claim certain rights to appropriate water somewhere in this stream, which may be in California, or may be in Nevada, and to protect which rights the cross-bills were filed in the action in Nevada. As above noted, it is obvious that if appellees desired to divert this water in California, the Nevada court had no jurisdiction to protect them, having clearly no jurisdiction over controversies relating entirely to rights in the stream in the State of California, and if both parties desire to

appropriate the waters of the stream in the State of California, it would be absolutely clear that the rights of both parties there in conflict were entirely in the State of California and beyond the jurisdiction of the Nevada court.

Conant vs. *Deep Creek Irr. Co., supra.*

Therefore let us assume that appellees desire to exercise their rights in this stream and make their appropriation and diversion in the State of California, then, beyond question, appellees' rights in the stream are in the State of California. Then let appellees change their point of diversion and usure down the stream onto lands in the State of Nevada. By so doing, have they lost their rights in the State of California? Or, have they not the very same rights in the stream in the State of California that they had before they changed their point of usure? We respectfully submit that they have. They have lost no rights in the State of California by changing their point of diversion and usure to a point lower down the stream, and in the State of Nevada, and they can at any time change their point of diversion and usure back up the stream into the State of California, which they could not do if they did not still have rights in the stream in said latter State. By changing their point of diversion and usure from the State of California to a place lower down on the stream, and in the State of Nevada, they may acquire rights in the stream in the State of Nevada, viz., to have this water

flow uninterrupted down the stream in the State of Nevada, that they did not have when they were diverting all the water they were entitled to in the State of California. The acquisition of these new rights to have the water flow down the stream in the State of Nevada that result from appellees changing their point of diversion and usure from a place up the stream and in the State of California to a place lower down on the stream and in the State of Nevada, does not carry with it the sacrifice or loss of any rights in the stream in the State of California. These rights to have the water flow down the stream in the State of California are there, just as much as they ever were, and any action that has as its subject matter rights in the stream in California may affect these rights, but the rights affected are just as much in the State of California in the case supposed after the point of diversion and place of usure has been transferred from the State of California down the stream into the State of Nevada, as it was prior to the change of the place of diversion and usure, and when both parties claimed to use the water in the State of California.

To reiterate what has been said before, the right in the stream is to have the water flow uninterrupted down to the point of diversion. That right is in the stream from its source to the owner's point of diversion. As a result of the injury to that right at a point up the stream in the State of California the owner may be unable to enjoy the right to its fullest extent farther down the

stream in the State of Nevada, but the location of the right to have the water flow down the stream uninterrupted in the State of California injured by the diversion in the State of California and the location of a right involved in an action to determine rights in the stream in the State of California is in no wise moved down the stream from the State of California into the State of Nevada by reason of the fact that the appropriator may desire to divert the water from the stream in the State of Nevada instead of in the State of California. His right is to have the water flow uninterrupted down the stream to his point of diversion and appropriation. If his point of diversion is in California, his right only exists in California, but if his point of diversion is lower down the stream in Nevada, his right extends down the stream into the State of Nevada as well as in the State of California, for the water, to reach him, must flow through the State of California and then down through the State of Nevada.

If the appropriator desires to divert the water in the State of California, the courts of California can give him complete protection, but if he desires to appropriate the water in the State of Nevada, the courts of California can protect his right to have the water flow down the stream in the California portion of the stream, but the courts in California can not protect his right to have the water flow down the stream in the Nevada portion of the stream. For this protection and the establishment of these latter rights, he must go into

the courts of Nevada, which are the only courts having jurisdiction thereof.

Just as the courts of California can not protect the appropriator's right to have the water flow down the stream through the State of Nevada, likewise the courts of Nevada can not protect the appropriator's right to have the water flow down the stream through the State of California. If it is the right to have the water flow uninterrupted down the stream through the State of California that is involved, appellees must go to the courts of the State of California for protection, and the fact that as a result of the invasion of their rights in the stream in California they have less water to divert from the stream in Nevada, does not change the location of the right to have the water flow uninterrupted down the stream in the State of California. The rights to have the water flow down the stream in the State of California are in California, irrespective of the location of more or less direct or indirect consequences of an invasion of the rights to have the water flow uninterrupted down the stream in said State, which consequences, as above noted, may exist in the State of Nevada, and may exist in the City of San Francisco. The right injured is in California.

The precise point under discussion was involved in the case of *Stillman* vs. *White Rock Mfg. Co.*, 23 Fed. Cases, p. 83. In this case a stream flowed between the State of Rhode Island and the State of Connecticut. Plaintiff owned certain mills on the Connecticut side

of the stream and the defendant diverted water on the Rhode Island side of the stream. The action was brought in the United States Court for the district of Rhode Island to enjoin the diversion, and the question of the jurisdiction of the Rhode Island court over the subject matter of the action was put in issue. The Court made it clear that the rights involved in that action were in the stream in Rhode Island, pointing out that as a result of defendant's diversion and invasion of complainant's right in the State of Rhode Island there might result a consequential injury to complainant in Connecticut, but the direct injury and the rights directly involved were located in the State of Rhode Island. The Court quite extensively discussed the questions there involved in the following language:

> "Whether such injuries are to be considered as done to the soil and freehold of the owner on the side where that is situated, or to some corporeal easement or right incident to that which he enjoys undivided in the use of the whole water in the river in its natural flow or bed going across the center, and being entitled beyond it to have the water employed only to the extent of one-half in quantity, would not in most cases be very material. If both sides of the river were situated in the same State, under the same laws, or were within the jurisdiction of the same courts, then to discriminate as to the precise extent and locality of the injury for which the action was brought would often be of little importance. But here, unfortunately, different States

and different laws in some respects govern the two sides, and different circuits of this court possess jurisdiction on each side no less than different State courts.

"It becomes necessary, therefore, to ascertain now, what is the interest, if any, which the complainants by owning land on the Connecticut side of the river are entitled to in the water on the Rhode Island side; and, indeed, this becomes almost the whole gist of the controversy. After careful inquiry this interest seems to me to be such a corporeal easement or right as has just been described to an undivided half of the water on that side, as well as on the other side. A fence or embankment can not be usually made in the middle of a large stream where the right to the soil terminates; and if made, it would not correspond with the true interests each owner on the banks has to some extent in all the flowing water between those banks. Hence it is reasonable to regard these interests in the whole stream to be an undivided half, or tenancy in common, and if either side uses or takes out more than half, or at a place above removes and diverts large quantities from coming at all to the dam where the complainants are interested, their proportionate interests in the whole stream are injured, and an action of some kind or other must lie for redress somewhere. *Ang. Water Courses*, p. 11, Sec. 3, and cases there cited; *Webb* vs. *Portland Mfg. Co.* (Case No. 17,322). Probably different forms of action may lie, as redress is sought for different views of the injury, and these different actions may be brought properly in one State or the other, as they relate more immedi-

ately to the acts done as affecting the land and mills the plaintiffs own in Connecticut, or as affecting the undivided share in the water on the Rhode Island side, which the plaintiffs also own. The canal here being on the Rhode Island side, and first injuring the rights of the plaintiffs there to an undivided half of the stream, would seem to justify an appropriate remedy there for that particular wrong.

"*The injury thus far and in this view may be regarded as committed on interests possessed in the water beyond the center of the stream,* and not entirely on or to the mill and land situated upon one of the banks, or to merely that half of the stream which is contiguous. Such interests may exist in water and its use. 2 N. H., 259. *The first and direct injury, then, is to the easement and consequent rights existing beyond the center. The next consequential injury would be to the mills and land adjoining the stream before reaching the center on the Connecticut side, and an appropriate remedy for that would lie there.* Thus a right of way on land in one State to a farm in another is an interest situated in the first State and an obstruction to it may be there prosecuted. There is nothing in the nature of easements or services attached to other property which makes them and the property identical in their locality. Nature fixes the locality of each, and one may be in one town, county or State, and the other as well be beyond the dividing line in another, though contiguous, and a suit lie in the other for the injury committed there. 7 *Coke,* 62.

"The chief error in the position of the respondents is in supposing that the planitiffs have *no rights*

whatever beyond the center of the river, or no interests to be protected there." (Italics ours.)

See also

Bannigan vs. *City of Worcester,* 30 Fed., 394.

This Court can not affirm the decree herein which was awarded on the necessary ground that the subject matter of the action commenced by appellant in the State of California is the same as the subject matter of the cross-bills filed by appellees in the State of Nevada, without ruling directly in conflict with the decisions announced in the cases of

Howell vs. *Johnson,* 89 Fed., 559.
Morris vs. *Bean,* 123 Fed., 618.
Hoag vs. *Eaton,* 135 Fed., 411.
Anderson vs. *Bassman,* 140 Fed., 14-20.

These cases all hold that the right of appellees to have the water flow down the stream in the State of California exists in the State of California. If that were not the case, the Federal Court, in all these cases, would not have had jurisdiction over the subject matter therein being litigated. In each one of these cases the appropriator on the stream in the lower State brought the action to protect his rights in the stream and enjoin the diversion from the stream in the upper State in the courts of the upper State. These actions were presented on bills of complaint of precisely the

same nature as the original bill of complaint in the case of *Miller & Lux* vs. *T. B. Rickey et al.,* which this Court has, as we believe, correctly denominated an action to quiet title to real property and a local action. If the rights involved in those actions did not exist in the stream in the upper State, then it follows that the courts in each of those actions had no jurisdiction over the subject matter thereof.

But we submit that the decisions of the Court in those cases were correct. The rights therein involved were rights in the stream in the upper State, just as are the rights involved in the actions commenced by appellant herein in Mono County, California, to quiet its title to the waters of the Walker River in the State of California.

Supposing that appellees herein had gone into the United States Circuit Court for the northern district of California and commenced an action against appellant herein to enjoin appellant from diverting the water of the Walker River in the State of California, and set up their rights and appropriations in said Walker River, where would have been the subject matter of that action? Clearly it would have been exclusively in the State of California. Should appellees prevail, the said court of California would have jurisdiction to protect their rights to have the stream flow uninterrupted through the State of California, but the power of the California courts to protect appellant's rights in the stream would stop at the State line. It could deliver

the water at the State line but no further. Appellant might, if such a decree were rendered in the court in the State of California, set up a claim to the water in the stream in the State of Nevada, and above appellees' point of usure in the State of Nevada, and the decree in the court of the State of California could in no wise determine rights in the stream in the State of Nevada or protect appellees' rights to have the water flow uninterrupted in the stream through the State of Nevada. To do this, appellees would have to have recourse to the courts of the State of Nevada.

As the rights and subject matter involved in the four cases above cited were within the jurisdiction of the respective courts, then it follows of necessity that the rights involved in the actions commenced by appellant State of California. If these same rights and this same subject matter is within the jurisdiction of the court sitting in the State of Nevada, then it of necessity follows that the courts of the two States have concurrent jurisdiction over this subject matter, which is impossible, as Congress has not enlarged the jurisdiction of the Federal courts through whose districts interstate streams flow so as to include rights in the stream outside of the district of the court as well as rights in the stream within the district of the court.

If the courts in the above cited cases had jurisdiction, they had jurisdiction because there were rights involved in those actions that were located in the stream in the upper State. Whatever those rights were, they could

not be protected by the courts of the lower State because they were beyond the jurisdiction of the courts of the lower State. Those were the rights of appellees that were involved in the actions commenced by appellant in Mono County, California, and none of those rights are involved in the actions pending in the State of Nevada wherein appellees filed their cross-bills. Thus the subject matter of the actions is distinct and by no possibility could the two actions, having different subject matters, present the same issues; the issues in each action being as to the title of the respective subject matter therein being litigated.

In other words, suppose appellees, or Miller & Lux, in addition to bringing the action in Nevada had also brought an action in the State of California. Would there have been any conflict between the two actions? Manifestly not. The action brought in the State of Nevada has for its subject matter the protection of rights in the stream in the State of Nevada, and the action brought in the State of California would have as its subject matter the protection of rights in the stream in the State of California. By virtue of the two actions Miller & Lux and appellees would establish and protect their entire rights in the stream in California as well as in Nevada, but they could not do this otherwise. By commencing an action in California they could not protect their rights in the stream in the State of Nevada, and likewise, by commencing an

action in the State of Nevada they could not protect their rights in the stream in the State of California.

To sustain the decree herein, it is necessary to apply the doctrine of lis pendens. To do so this Court must hold that that subject matter of a local action commenced in the State of Nevada is real property situate in the State of California. The cross-bills herein are filed against T. B. Rickey, who was the defendant in the original actions commenced by Miller & Lux on June 10, 1902. On August 6, 1902, T. B. Rickey transferred his lands and water rights in the State of California to the Rickey Land and Cattle Company, appellant herein, and the actions, the prosecution of which is herein enjoined, were brought by the Rickey Land and Cattle Company.

For the doctrine of lis pendens to apply, there must be a transfer of a res which is the subject matter of an action pending. The *res* transferred from T. B. Rickey to the Rickey Land and Cattle Company was situate only in the State of California and thus wholly outside of the territorial limits of the jurisdiction of the Nevada court, and thus the *res* transferred could not be the subject matter of the cross-bills filed by appellees in that action, yet the *res* transferred was the subject matter of the action in the Mono County suits, and thus it follows that the subject matter of the action of the Mono County suits is not the subject matter of the Nevada action.

The theory on which the decree herein was rendered is that unseemly conflicts between courts should be avoided and prevented. Our answer is, that, if the courts of the State of Nevada take upon themselves the function of deciding as to titles to an interest in a stream flowing in the State of California, the necessary result of such a procedure will be unseemly conflicts between courts.

In California the doctrine of riparian rights in streams prevails, which doctrine is a part of the law of the State. In the State of Nevada the doctrine of riparian rights is not recognized. If the courts of the State of Nevada are going to take upon themselves the deciding of titles in streams flowing in the State of California, it is more than probable that their decision will be in conflict with the decision of the California courts on the rights in the stream and we will have nothing but unseemly conflicts between courts.

But let the law be as we here contend. Let the Nevada appropriator have recourse to the courts of the State of Nevada to protect his rights in the stream in the State of Nevada, and let him have recourse to the courts of California, State or Federal, to protect his rights in the stream in the State of California, and all will be harmonious and without conflict.

REVIEW OF THE DECISION OF THE CIRCUIT COURT OF APPEALS.

Before concluding this argument we deem it necessary to further discuss the conclusions and argument of the Circuit Court of Appeals in the case of *Rickey Land and Cattle Co.* vs. *Miller & Lux,* 152 Fed., 11. By doing so, we will put to the test the arguments made herein. The first two pages of that opinion are devoted to an undisputed proposition, namely, that the right to have water flow in a river to the head of a ditch is an incorporeal hereditament appurtenant to the ditch, or to the land upon which the use of the water is had.

This statement does not in any degree tend to locate the easement in the stream to which the incorporeal hereditament is attached. From the authorities cited the easement is not confined to any particular section of the stream, but is impressed upon the stream from its source to the head of the particular ditch. It is not undissolubly annexed to any particular ditch or to any particular land. The easement in the water may be transferred from a present owner to another, and the present owner or such transferee may change the place of use or diversion so that the right is appurtenant to other lands or other ditches. Whatever changes are made in this respect, the location of the easement remains the same. It always remains a right in the particular stream.

It follows, therefore, that the determination of what particular land the easement is appurtenant to at any particular time does not in any manner determine or change the location of the easement.

The Court therefore made no progress toward the question of *jurisdiction* when it arrived at the conclusion that the right to have water flow to the head of a ditch was an incorporeal hereditament and was appurtenant to certain lands in the State of Nevada. The easement was in the stream and the stream was definitely located by nature, and this controlling fact can not be changed.

This easement claimed by Miller & Lux attached to the entire stream above the ditches of Miller & Lux. A part of this was in the State of Nevada and a part was in the State of California. To the part in the State of Nevada appellant disclaims all interest. To the part in the State of California it asserts a right.

The Court of Appeals determined expressly that the original suit by Miller & Lux "is one to quiet title to " realty," and that the right to water was to be treated as real estate, and further that the court of Nevada could not quiet the title to land in the State of California.

It occurs to us that these conclusions should lead directly to a reversal of the decree appealed from and not to an affirmance of it. The subject matter of the Mono County case in California was unequivocally real estate in the State of California. This Court concluded

that the Nevada court had no jurisdiction to quiet the title to this land. How then did the Court arrive at a conflict of jurisdiction between the two courts?

The reasoning of this Court supporting the jurisdiction is as follows, see page 17:

> "The appellant's counsel maintain that, because the appellant has set up in its answer and cross-bill to the original suit that it has an appropriation in California for the purpose of irrigating lands in that State, therefore the court in Nevada has no jurisdiction to determine its rights in the State of California. The contention seems to us to be beside the question. The defendant will not be permitted, by thus setting up a cause of suit in the State of California, to defeat the jurisdiction of the court in the State of Nevada. The complainant must be permitted to proceed upon the case made by its pleadings, and the [illegible] jurisdiction by alleging [illegible]antity of the waters of the which may conflict with the [illegible] is beyond the jurisdiction ant. It may be said that the co[illegible]sking the Court not the power to quiet the title of the [illegible] in another the State of California. But the defend[illegible] right to set up its conflicting interests, whi[illegible] in California, as a defense against the atte[illegible] the complainant to have its title in Nevada qu[illegible] because the complainant's title must depend up[illegible] whether it has the better right as against the de[illegible] fendant—the rights of the parties arising in the States in which their respective interests are found. So that the answer and cross-complaint of the defendant can only operate defensively in the orig-

inal suit, and not to give the defendant a right to have its title also quieted in the State of California. Though the Nevada court is not authorized or empowered to settle the rights of the parties in the State of California, it may look, nevertheless, under the defensive answer to the appropriation in the State of California, to ascertain and determine whether such appropriation is prior and paramount to the complainant's appropriation, and, if not, then to settle and quiet complainant's title and rights thereto.

"That our position may be fully understood, we will extend the discussion a little. The water in the stream, which has a propensity to seek its level, and will continue in its current to the sea, is in strict reality the veritable thing in controversy. It knows not imaginary State or county lines, and is a thing in which no man has a property until captured to original case, ... e. The right of appro- swer or cross-bill, we do ... law, which means the right part of the opinion ... use. It is the right, not to any of action in an ..., but to some definite quantity of that the jurisdi... y at the time be running in the stream. So ... gnt acquired by an appropriation includes the to a ca... t to have the water flow in the stream to the if M... oint of diversion. The fact of a State line intersecting the stream does not, within itself, impinge upon the right. In other words, the appropriation may still be acquired, although the stream is interstate and not local to one State; nor will the mere fact that the stream has its source in one State authorize a diversion of all the water thereof as against an earlier and prior appropriator across the line

in another State. On the contrary, one who has acquired a right to the water of a stream by prior appropriation, in accordance with the laws of the State where made, is protected in such right as against subsequent appropriators, though the latter withdrew the water within the limits of a different State. *Howell* vs. *Johnson,* 89 Fed., 556; *Hoge* vs. *Eaton,* 135 Fed., 411; *Anderson* vs. *Bassman,* 140 Fed., 14. So that in determining the right of appropriation in one State, it may become necessary to ascertain what are the rights in another, and a mere assertion of rights in the courts of the latter State can not operate to preclude the courts of the former from exercising cognizance over the entire subject matter before them. The very question that appellant makes was determined in the case of *Anderson* vs. *Hassam, supra.* 'It is objected by the defendants,' says Morrow, Circuit Judge, 'that the relief sought by the bill, in determining the rights of the complainants to a specific quantity of the waters of the west fork of the Carson River, is beyond the jurisdiction of this court, in that it is asking the Court to pass upon titles to real property in another State.' "

As the whole decision rests upon this part of the opinion we desire to follow this reasoning sentence [illegible] sentence to see wherein its error lies.

We are unable to understand what is alluded to in this language:

"The appellant's counsel maintained that because the appellant has set up in its answer and cross-bill

to the original suit, that it has an appropriation in California for the purpose of irrigating land in that State, therefore, the court in Nevada has no jurisdiction to determine its right in the State of California. The contention seems to us beside the question. The defendant will not be permitted by thus setting up a cause of suit in the State of California to defeat the jurisdiction of the court in the State of Nevada."

There was no allusion to the answer of the defendant Rickey in the record and no argument was predicated upon any issue made by the answer, and there was no cross-bill whatever filed by Rickey in the original suit. We are unable to account for this statement in the opinion. Unless the Court intended to treat the complaints in Mono County as standing in the same relation to the original case, as would such facts if stated in an answer or cross-bill, we do not know how to apply this part of the opinion. Manifestly to so apply a cause of action in another State, would be to make it a plea to the jurisdiction, not of a cause of action in Nevada, but to a cause of action in the State of California. And if Miller & Lux had expressly stated a cause of action for the water in the State of California, the plea would have been sustained.

The next sentence is also predicated upon the same conception:

"Complainant must be permitted to proceed upon the case made by its pleadings and the defendant

> can not defeat the jurisdiction by alleging that it has rights elsewhere which may conflict with the rights of the complainant."

It is observed that the Court uses the words "can not " defeat the jurisdiction." That is true, but this assumes that there is a jurisdiction to be defeated, the very question to be determined in this case. We are contending that the court has no jurisdiction, not that we have power to defeat such jurisdiction as the court has.

The next sentence: "It may be said that the court in " Nevada has not the power to quiet the title of the de- " fendant in the State of California." With this statement there is no controversy, but we do further contend that the court of Nevada has no power to quiet the title of the complainant, *Miller & Lux,* in the State of California, and because the court has no such power regarding the title of *Miller & Lux* to the water in the State of California, therefore there could be no conflict of jurisdiction between the two courts.

The opinion proceeding says:

> "But the defendant has the right to set up its conflicting interests which arose in California [which *are* in California, they never were in Nevada], as a defense against the attempt of the complainant to have its title in Nevada quieted, because the complainant's title must depend upon whether it has a better right as against the defend-

ant, the rights of the parties arising in the States in which their respective interests are found."

We think this sentence suggests the fallacy of the opinion. It involves this proposition that the title of the plaintiff in the State of Nevada is determined by the title of the defendant in the State of California. This is specious in this, that it turns the subject of universal inquiry, *the title of Miller & Lux,* and looks at it from the standpoint of the title of the defendant. The defendant's title or right to use the water is not the question for adjudication.

If we keep in mind at all times that we are inquiring into the title of Miller & Lux in and to the water, and that the title of Miller & Lux is at all times the subject matter of the action in Nevada, this statement in the opinion should read: "but the defendant has a right to "set up its conflicting interests which are in California "as a defense against the attempt of the complainant "to have its title in Nevada quieted, because the com- "plainant's title in Nevada must depend upon whether "it has the better title as against defendant *in the State* "*of California.*"

The rights of the parties both attaching to the stream in the State of California; that is to say, the title of Miller & Lux in the State of Nevada depends upon the title of Miller & Lux to the water in the State of California.

By determining what the title of the defendant Thomas B. Rickey is to the water in the State of Cali-

fornia is only another way of determining what is the title of Miller & Lux to the waters in the State of California. After determining the rights of Rickey in the State of California, we arrive at the rights of Miller & Lux by elimination, but the method of proof does not change the subject of inquiry, which at all times is the title of Miller & Lux.

It is admitted, however, that this inquiry as to the title of Miller & Lux in the State of California cannot be made by the court in Nevada, and this conclusion cannot be avoided by a declaration that the inquiry is not to determine the rights of Miller & Lux to the stream in the State of California, but is made for the purposes of determining the rights of Miller & Lux in the stream in the State of Nevada.

In other words, Rickey, disclaiming any rights whatever in the stream in the State of Nevada, concedes the title of Miller & Lux to that part of the stream, and only challenges the interests of Miller & Lux in the State of California, which he at the same time says the courts of the State of Nevada have no jurisdiction to try and determine.

A further test of the fact is that when the rights of Miller & Lux are quieted in the State of Nevada, the only contemplated trespass upon the rights in the State of Nevada are to be made by physical diversions of the water in the State of California.

Miller & Lux claims an easement in the stream from their ditch in Nevada to the source of the river. Rickey

claims an easement in that part of the stream only in the State of California. Why should it be said, therefore, that in determining the rights of Rickey in the State of California you are not at the same time determining the rights of Miller & Lux in the State of California? The very paragraph of the opinion above quoted asserts that Miller & Lux rights attached to the stream in the State of California.

The next sentence of the opinion, "so that the an-" swer and the cross complaint of the defendant can " only operate defensively in the original suit, and " not to give the defendant a right to have its title also " quieted in the State of California." We fully agree that the court of Nevada cannot quiet the title of the defendant, nor for that matter, *of the plaintiff either,* in the State of California, and we agree also that if the court of Nevada can try the defendant's rights to the water in the State of California, though the Nevada court is not authorized or empowered to settle the rights of the parties in the State of California, it may look [illegible]eless, through the defensive answer to the appro- the [illegible]tion in the State of California, to ascertain and determine whether such appropriation is prior and paramount to the complainant's appropriation, and if not, then to settle and quiet complainant's title and rights thereto.

It will be observed that this statement only contemplates rights to the use of water acquired by appropriation, in which instance the rule generally prevailing is

that those prior in time are prior in right. It leaves out of consideration entirely his riparian rights to the use of water which exist in the State of California, and do not exist in the State of Nevada, and which riparian right does not depend upon the use of the water.

Let us, however, analyze the sentence as it is written, and that the Court has entered a judgment quieting complainant's title to the rights of water. After inquiring into the defendant's rights in the State of California, and assuming that such judgment is pronounced, have you not then determined the defendant's title to the waters in the State of California?

Then it follows that the jurisdiction of the court only affected the water after it reached the State of Nevada. If you have, then you have carried the force of the decree quieting the title into the State of California and affecting the water in that State. To make this clear, let us assume that judgment has been rendered for complainant quieting its title to the water, and that the judgment is offered in evidence of plaintiff's rights to the water in the suits in California. They would not be received in evidence as a muniment of title in the State of California. The entire argument of the Court of Appeals on pages 19 and 20, based upon an assumption of jurisdiction in the court and an assumed contention on the part of appellant that the answer of defendant limits or circumscribes the admitted jurisdiction, whereas the real contention is that the court has not jurisdiction to be limited or circumscribed.

The contention of appellant is that as to the thing in issue of which the court of Nevada has power to determine no conflict of jurisdiction in the State of California can possibly arise. It becomes a question, what is the jurisdiction of the thing in the State of Nevada to ascribe to defendant a lack of power to limit such jurisdiction?

Let us assume for a moment that the Court of Nevada inquires into the rights of Mr. Rickey in the State of California merely for the purpose of determining what are the rights of Miller & Lux in the State of Nevada, and not for the purpose of determining what are the rights of Miller & Lux in the State of California. Then, what becomes of the doctrine of lis pendens?

The doctrine of *lis pendens* can only apply to such litigation as has some *thing* for its subject. The doctrine has no application in cases entirely personal. If the thing is Miller & Lux's title in Nevada, then to this thing the doctrine of *lis pendens* must be applied. As this thing was not conveyed by Rickey to the Rickey Land and Cattle Company, there would be no room for the application of the doctrine to a transfer of something other than the thing in litigation. The thing transferred by Rickey was the land and water in the State of California, and unless the thing about which Miller & Lux were litigating to quiet the title was this same property *in the State of California,* then the doctrine of *lis pendens* would be excluded.

The Court of Appeals argues that the thing is in

the State of Nevada as between Miller & Lux and Rickey to sustain the jurisdiction of the court and then impliedly grants an order to apply the doctrine of *lis pendens* on the ground that the thing is that which Rickey transferred to the Rickey Land and Cattle Company; that is to say, for the purposes of jurisdiction the thing, subject of the suit, is in Nevada. For the purposes of the doctrine of *lis pendens,* the thing, subject of the suit, is in the State of California.

If the action is local, and is substantially an action to quiet title in this case, and the thing, the title to which is said to be quited is in the State of Nevada, then it follows that the nature of the action and the location of the thing was the same in *Howell* vs. *Johnson,* 89 Fed., 556; *Hoge* vs. *Eaton,* 135 Fed., 411, and *Anderson* vs. *Bassman,* 140 Fed., 14.

As the action in each of these cases was commenced in the upper State on the stream, it would follow that the court did not have jurisdiction, because the location of the thing was not within the jurisdiction of the court. We believe those cases were correctly decided, and word "decided" upon the contention readvanced in this case. That the easement of the lower owner on the stream extends throughout the length of the stream above his place of diversion.

The Court of Appeals failed to give recognition to the distinction that the appropriator in the lower State has an interest in the stream in the upper State, while

the appropriators in the upper State have no rights whatever to the water in the lower State.

The last sentence quoted from the opinion seems to assume that the rights to the use of water are all acquired by appropriation in both States, and that the appropriator first in time is first in right. The argument based upon such a conception entirely ignores the rights vested in riparian owners.

In the State of Nevada the courts have refused to apply the doctrine of riparian rights to streams. In the State of California the riparian rights are fully recognized as they existed at common law with but one modification, namely, a reasonable use of the water among the several raparian owners for the purposes of irrigation.

Lux vs. *Haggin,* 69 Cal., 255.

In the State of California the riparian owners can use all the water among themselves, and an appropriator upon the stream never acquires any rights as against a riparian owner above his point of diversion upon the stream, and if the Walker River was entirely in the State of California then the title to the water would be owned by the riparian owners along its banks, and these riparian owners could use all of the water among themselves to the exclusion of all appropriators. As the stream is not entirely in the State of California, and as the State of Nevada recognizes no such thing as a riparian right, the question arises, who becomes

entitled to the use of the water after it crosses the State line?

If the riparian right of the State of California excluded the use for irrigation, then all the water of the stream would run into the State of Nevada. The State of California has modified the riparian right so as to permit the riparian owners to use a reasonable quantity for irrigation. To that extent they deprive the State of Nevada of the water so used. If the State of California can deprive the State of Nevada of a part of the water, it may, by its laws, deprive the State of Nevada of all of its water.

It has not yet been decided in the State of California whether an upper riparian appropriator can use all of the water of the stream as against the lower appropriator. If such should be declared to be the law of the State of California, then manifestly the appropriator of water in Nevada would have no greater standing to the water while flowing in the stream in the State of California than would the appropriator in the State of California. The suggestion of this question points out the argument that the appropriator in the State of Nevada, being such has an interest in the stream in the State of California no greater or no less than he would have if his acts of appropriation had actually occurred in the State of California.

The right of a riparian owner in the State of California is a part and parcel of his land (*Lux* vs. *Haggin, supra*), so that in inquiring into the rights of appellant

in the State of California to the water, you are at the same time inquiring into that which is a part and parcel of its land. As against such upper riparian taking *all* the water for use upon riparian land, the lower appropriator may be held to have no cause of complaint. If such should be the holding, then the appropriators in Nevada (in which State riparian rights are not recognized) would have no cause of complaint against Rickey, or the Rickey Land and Cattle Company, riparian owners, who use all the water in the State of California. The Federal Court must adjudge the rights of the parties in the stream according to the laws of the particular State in which the rights are asserted.

Barney vs. *Keokuk,* 94 U. S., 324;
Parker vs. *Bird,* 137 U. S., 661;
Hardin vs. *Jordan,* 140 U. S., 371.

Such court cannot administer a common law exclusively appurtenant, or exclusively riparian, to conform to the law of Nevada or of California. It follows that the statement in the opinion of the Court of Appeals that the inquiry is merely to determine *priority of appropriation,* and to adjudge and command accordingly, ignores absolutely the riparian rights of a part and parcel of the land in the State of California. The conclusion of the court from such a premise must necessarily be wrong. To adjudge the rights of Rickey or his successors in the State of California, the very title to the land of which the water is a part under the riparian law

must be determined, and any command as to the use of such water on such riparian land is a command regarding the land itself. There is what appears to be a radical inconsistency in the argument of the Court of Appeals in determining what is the thing, subject of the action, to sustain the jurisdiction, and the same thing for the application of the doctrine of *lis pendens* against the transferee of Rickey. In the first argument the *title of Miller & Lux* in the State of Nevada is declared to be the thing, and the inquiry into the rights of Rickey in the State of California but an incidental inquiry to ascertain what Miller & Lux's rights were in the stream in the State of Nevada. To be logically consistent this conception should be adhered to. The court should not change its viewpoint so as to sustain the jurisdiction upon the theory that the subject matter of the suit is the title of Miller & Lux in the State of Nevada, and then apply the doctrine of *lis pendens* upon the theory that the subject of the action is the title of Rickey in the State of California. This last has been done. Let us see. It is held that the Rickey Land and Cattle Co., as grantee of Rickey, will be bound by the judgment. How? The answer is by the rule of *lis pendens*. Yet this rule has no application unless there is a thing the subject of the litigation, and the thing has been transferred. If the thing the subject of this litigation is the title of Miller & Lux to water in the State of Nevada, Rickey never attempted to transfer that. He only transferred the rights to water of *Rickey* in the

State of California. It would therefore follow that Rickey did not transfer the thing which was the subject of the action.

This inconsistency points an erroneous conception of the subject of the action in the State of Nevada, when the jurisdiction is sought to be extended into an inquiry of rights to the use of water in the State of California. In other words, the rule of *lis pendens* is applied to a subject matter, water in California, over which the court admittedly has no jurisdiction, while the court asserts its jurisdiction over water in the State of Nevada. The rule of *lis pendens* is applied upon the conception that the subject of the action is Rickey's title to water in the State of California, while the jurisdiction of the court is asserted upon the theory that the subject of the action is the title of Miller & Lux in the State of Nevada.

All of this contradiction disappears when we consider the action as it really is. First an action the subject matter of which is in the State of Nevada, and that the issue, if any is attempted to be presented, between Rickey and Miller & Lux as to water in the State of California, is concerning Miller & Lux's right to water *in the State of California.*

The trouble arises in attempting to apply the rule of *lis pendens* to sustain a jurisdiction of a subject matter that does not exist.

If the Court of Nevada had no jurisdiction to try the title of Miller & Lux to the waters in the State of Cali-

fornia, then the end could not be reached by indirection; that is, the end could not be attained by saying the inquiry into the rights of Rickey in California was to determine what were the rights of Miller & Lux in Nevada, and then applying the rule of *lis pendens* to a conveyance by Rickey of property in the State of California. All this juggling is made necessary by an attempt to affirm jurisdiction where jurisdiction does not exist.

Certainly a plaintiff has no right to an extension of the rule of *lis pendens* beyond all precedent when by bringing the action in the first instance in the proper State no such extension would be required. The rule or doctrine of *lis pendens* is intended to hold jurisdiction acquired; it is not intended to extend it.

There are other parts of the opinion of the Court of Appeals which deal with abstraction so far as the conclusions of that Court are concerned. These are in no sense pivotal, and the conclusions reached are in no manner connected with them.

II.

Assuming that the issues presented by the actions commenced by appellant in the Superior Court of Mono County, California, are the same issues presented by the cross-bills filed in the United States Circuit Court for the District of Nevada by appellees, yet as appellees herein were served with summons and made a general appearance in said actions in California

by filing demurrers therein before they filed said cross-bills or commenced this action, they thereby waived their right to object to the prosecution of the said actions in California.

Counsel urged that the fact that one of the grounds of demurrer filed by appellees in the California court was that the California court did not have jurisdiction, and that this saves appellees from any waiver of their right to object to the prosecution of the actions in California.

A demurrer is a general appearance and gives the court jurisdiction over the party on the facts set out in the bill.

McDonald vs. *Agnew,* 122 Cal., 448;
Lowery et al. vs. *Tile, Mantel & Granite Ass'n of Cal.,* 98 Fed., 817.

If appellees desired to object to the jurisdiction of the California court on the ground that the same issues were pending for determination in another court, such objection should have been made by a special appearance directed to that specific purpose, which might possibly have kept the jurisdiction of the California court from attaching, had it not already attached.

Security L. & T. Co. vs. *Boston & S. R. F. Co.,* 126 Cal., 418.
In re Clarke, 125 Cal., 388.
Lowe vs. *Stringham,* 14 Wis., 222.

Gilbert-Arnold L. Co. vs. *O'Hare,* 93 Wis., 194 (67 N. W. Rep., 38).

Case vs. *Olney et al.,* 106 Fed. Rep., 433.

The making of a general appearance and filing of a demurrer waives the right to make a special appearance and urge any objection to the jurisdiction of the court on the ground that another action was pending involving the same subject matter.

Hodges vs. *Price,* 80 Pac. Rep., 202, 204 (Wash., 1905).

Larsen vs. *Allan Line S. S. Co.,* 80 Pac. Rep., 181 (Wash.).

Walters vs. *Field,* 70 Pac. Rep. 66 (Wash.).

The objection that another action is pending is urged by a motion to continue the case and await the decision in the other action. The case of the *National Steamship Co.* vs. *Tubman,* 106 U. S., 118, cited by appellees, was one where the defendant had made a special appearance, saving their jurisdictional rights which had been overruled, and thereafter they made their general appearance, which was held not to have waived the point raised by the special appearance which the court had theretofore overruled.

Appellants urge that the subject matter of the original action of *Miller & Lux* vs. *T. B. Rickey et al.,* included the subject matter of the cross-bills and consequently all controversies that might arise between the

co-defendants in said action over their respective rights to the waters of the stream, and thus argue that if the court in the original action had jurisdiction over all questions of facts arising upon the cross-bills of appellees before the cross-bills were filed, the commencement of the action in Mono County infringed the jurisdiction of the said United States Court, irrespective of the cross-bills.

It is to be observed that the bill of complaint herein alleges that the issues presented in said actions in Mono County are the same issues as were presented by the cross-bills (Trans., p. 17). Nothing is said about the issues presented in the California court, being the same issues as were presented by the original bill filed by Miller & Lux. The original bill filed by Miller & Lux was to quiet and protect the title of complainant therein, and had not as its subject or scope a quieting or protecting of the titles of the defendants therein or the adjudication of conflicting rights and claims for title between the defendants. None of these issues were presented by the original bill and none of these issues were in the case until the cross-bills were filed, but prior to that, assuming the courts of California and Nevada have concurrent jurisdiction over this subject matter and issues, these issues had been presented in the California court.

As noted in our opening brief, suppose appellees had not filed any cross-bills, should they be heard for a minute had they come into the United States Court to

obtain an injunction against the appellant herein on the ground that the issues presented by the action in Mono County are the same issues as were presented by the original bill in the case of *Miller & Lux* vs. *T. B. Rickey*? A simple statement of the proposition shows its absurdity.

Therefore we respectfully submit that:

First: The issues presented by the cases brought in the Superior Court of California are not the same issues as those presented by the cross-bills filed in the United States Circuit Court for the District of Nevada.

Second: Assuming that the issues presented by the actions commenced by appellant in the Superior Court of California are the same issues as presented by the cross-bills filed in the United States Circuit Court for the District of Nevada, yet, as appellees herein were served with summons and made a general appearance in said actions in California by filing demurrers therein before they filed said cross-bills, or commenced this action, they thereby waived any right to object to the prosecution of the said actions in California.

Wherefore, the court below erred in making the decree herein.

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